Indian Claims Commission

Moose Deer Point First Nation

Report on: Pottawatomi Rights Inquiry

102-02517/

Indian Claims Commission

Commission des revendications des Indiens

March 31, 1999

Chief Edward Williams and Council
Moose Deer Point First Nation

The Honourable Jane Stewart
Minister of Indian Affairs and Northern Development

The Honourable Anne McLellan
Minister of Justice and Attorney General of Canada

RE: Inquiry into the Moose Deer Point First Nation, Pottawatomi Rights Claim

On November 23, 1995, Chief Edward Williams of the Moose Deer Point First Nation wrote to the Indian Claims Commission requesting an inquiry into the Band's rejected Pottawatomi Rights Claim. The Commission began its work by convening a planning conference on August 30, 1996, where the parties discussed the issues pertaining to this claim and the conduct of the inquiry.

The Commission has reviewed several hundred pages of documents in the course of this inquiry. On April 8, 1998, the panel of Commissioners heard oral submissions from legal counsel for the parties on the question of whether Canada owes an outstanding lawful obligation to the Moose Deer Point First Nation pursuant to the Specific Claims Policy.

Our review of the history of this claim, together with our legal analysis and recommendations to the parties, is set out in the attached report, which we are honoured to present to you on this date.

FOR THE INDIAN CLAIMS COMMISSION

Carole T. Corcoran
Commissioner

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INDIAN CLAIMS COMMISSION

MOOSE DEER POINT FIRST NATION INQUIRY

POTTAWATOMI RIGHTS

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March 1999

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PART I

INTRODUCTION

The members of the Moose Deer Point First Nation (the First Nation) are Anishnabe people of predominantly Pottawatomi and Ottawa (Odawa) heritage who are extensively intermarried with the Chippewa (Ojibwa).[1] Their one reserve, Moose Point Indian Reserve (IR) 79, consists of three small parcels of land on a point on the east side of Lake Huron's Georgian Bay (see map 1 on page 2).[2] After 1763, the Pottawatomi ancestors of the First Nation fought as allies of the British to defend their home territory around Lake Michigan. During the War of 1812, they again fought with the British to defend Upper Canada from American incursions, as they did during the Rebellions of 1837-38. Of central importance to the present claim is the fact that many of Britain's Indian allies living in the United States relocated permanently to Canadian territory during the 1830s, relying, according to the First Nation, on promises made to them by the Crown's representatives.

PROCEDURAL BACKGROUND TO THE INQUIRY

This inquiry was convened to consider the First Nation's claim that Canada owes it an outstanding lawful obligation based on these promises alleged to have been made by the Crown to its allies, including the ancestors of Moose Deer Point First Nation. The inquiry therefore required the Indian Claims Commission (the Commission) to examine the history of the Pottawatomi Nation, to determine what types of promises, if any, were made to the First Nation, and to determine the legal effect of any promises made. As jointly framed by the parties, the issues under consideration were the following:

- Were promises made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation?
- If promises were made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation, what were the nature and the scope of the promises?
- Does the Crown have an outstanding lawful obligation to the Moose Deer Point First Nation?

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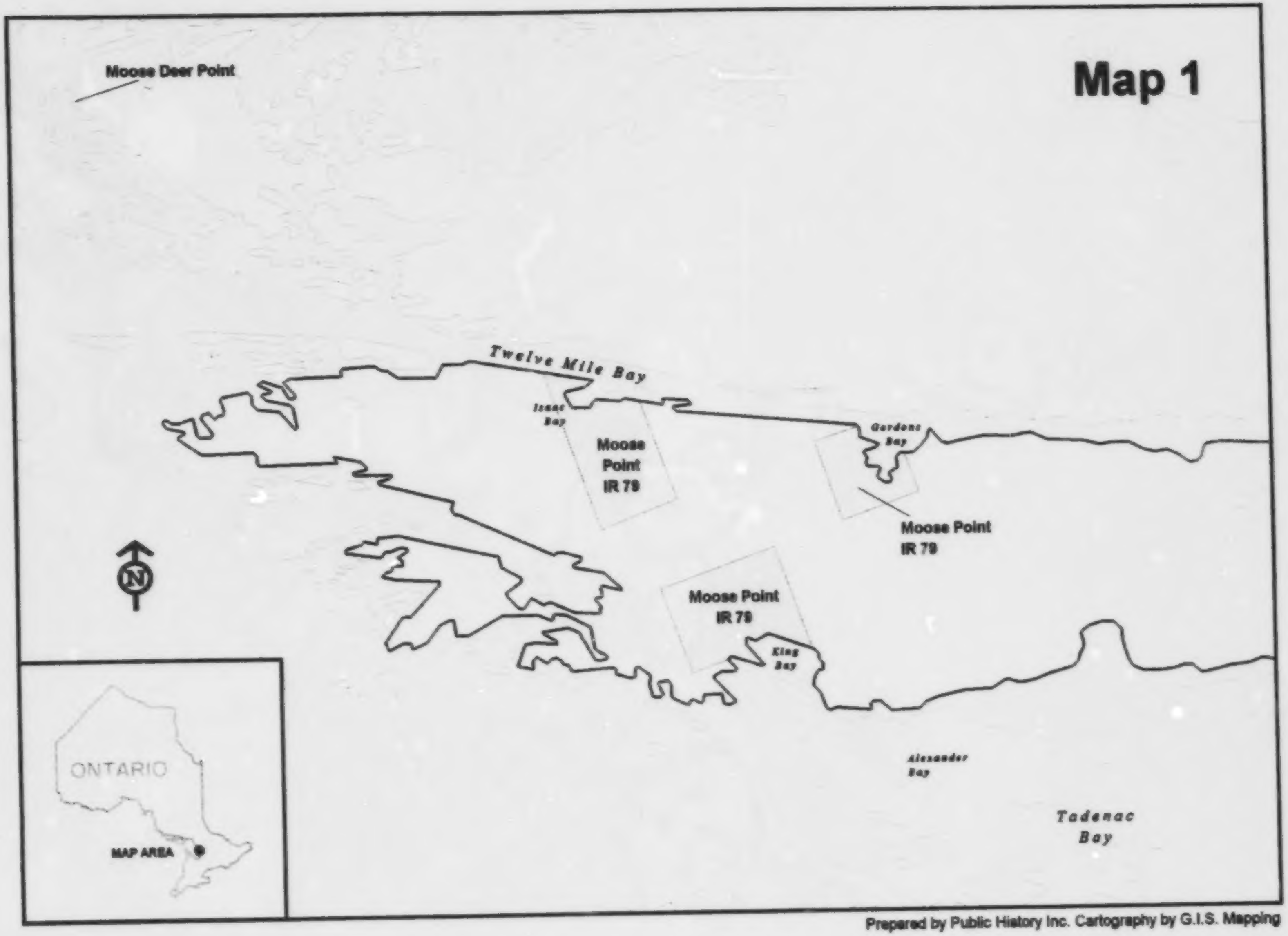
[1] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 2.

[2] The main village on the reserve has been known variously over the years as Moose Point, Moose Deer Point, Partridge Bay, King's Bay, or Alexander Bay.

Map 1


Moose Deer Point
Twelve Mile Bay
Isaac Bay
Moose Point IR 79
Gordons Bay
Moose Point IR 79
Moose Point IR 79
King Bay
Alexander Bay
Tadenac Bay
N
ONTARIO
MAP AREA

Prepared by Public History Inc. Cartography by G.I.S. Mapping

This claim for recognition of Pottawatomi rights in Canada was first submitted to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) by the Moose Deer Point First Nation in April 1995. At that time, the First Nation contended that "[t]he Crown's obligation arose out of [its] invitation . . . to its allies to settle permanently in Upper Canada, and to continue to enjoy the goods that had been given in furtherance of the treaties of military alliance"; the obligation also arose out of the Crown's offer of protection to its Indian allies.[3] Moose Deer Point submitted that, as a result of these promises, it became and continues to be entitled to "rights of use and occupation in the traditional territory of the Chippewas and Ojibwas of Georgian Bay" as well as the other unsurrendered "Pottawatomi rights" of annual presents and ongoing protection. The First Nation further submitted that its use and occupation of the Georgian Bay territory have been "impaired" without compensation by the development and settlement of the land without reference to, or protection of, the rights of the First Nation.[4]

Canada delivered its answer to the First Nation on August 18, 1995. At that time, Judy Glover, the Acting Director of Specific Claims East/Central, took the "preliminary position" that "the claim fails to demonstrate any outstanding lawful obligation":

> Although there are gaps and weaknesses in the historical record, we are prepared to accept that the Moose Deer Point First Nation is most likely descended from Chief Ogemahwahjwon,[5] a Pottawatomi who migrated to Canada from the United States in the mid-1830s. It appears that this chief and his followers were allies of the British during the War of 1812. There is some evidence which indicates that the British government promised its Indian allies that if they moved to Canada they would be allowed to settle here and that they would receive the same benefits as other Indians in Canada.
>
> In our view, it is not necessary for the purposes of this claim to determine whether any promises that may have been made by the British are binding on the

---

[3] Berger & Nelson, Barristers & Solicitors, "Re: Moose Deer Point First Nation Specific Claim," April 6, 1995 (ICC Documents, p. 393).

[4] Berger & Nelson, Barristers & Solicitors, "Re: Moose Deer Point First Nation Specific Claim," April 6, 1995 (ICC Documents, pp. 394-95).

[5] The First Nation refers to this former Chief as Ogemawahj, but the name has received a number of spellings over the years, including Ogemahwahjwon, Ogeemawatch, Ogimawadj, Ogemahwaht, Ogemahwahjwan, and Ogemahwadj. Ogemawahj also appears to have been referred to as Quasing. For purposes of consistency in this report, the Commission will use the form adopted by the First Nation: Ogemawahj.

> Crown. Any such promises were fulfilled by Canada's provision of land [IR 79] to the First Nation in 1917. Since that time, the First Nation has been treated in the same way as other bands.
>
> It is also our preliminary position that the Moose Deer Point First Nation has no aboriginal rights over the lands it now occupies, as these are not its traditional lands. There is no evidence that any general rights of use and occupation of land were granted to the First Nation in the promises which may have been made to it at the time it migrated to Canada, nor that any such rights have accrued to the First Nation since that time.
>
> For these reasons, we cannot accept the First Nation's claim for negotiation.[6]

Nevertheless, Glover also informed the First Nation that it had the option of going to the Indian Claims Commission "without submitting additional evidence or legal argument," using her August 18, 1995, letter as evidence that Canada would not accept the claim.[7]

On November 23, 1995, Chief Edward Williams forwarded Glover's letter to the Commission together with the April 6, 1995, claim submission and Band Council Resolution 1995-96-14 requesting that the Commission conduct an inquiry into Canada's rejection of the claim.[8] The Commission immediately started collecting relevant historical documents from the parties, and convened a planning conference in Ottawa on August 30, 1996. At the planning conference, the parties concurred that expert evidence would be unnecessary and, given that Chief Williams did not believe that a community session would be of assistance, agreed to proceed without oral testimony from the First Nation's elders. By October 3, 1996, the parties and the Commission had further agreed that they could rely solely on written submissions and could thus dispense with oral submissions by counsel.

In succeeding months, the parties and the Commission worked together to finalize and clarify the documentary record, and eventually established August 8, 1997, as the date for filing written submissions. The Commission ultimately received written submissions from the First Nation on

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[6] Judy Glover, Acting Director, Specific Claims East/Central, Indian and Northern Affairs Canada, to Chief Laird Hendrick, Moose Deer Point First Nation, August 18, 1995, p. 2.

[7] Judy Glover, Acting Director, Specific Claims East/Central, Indian and Northern Affairs Canada, to Chief Laird Hendrick, Moose Deer Point First Nation, August 18, 1995, p. 2.

[8] Chief Edward Williams, Moose Deer Point First Nation, to Indian Claims Commission, November 23, 1995.

August 1, 1997, and from Canada on August 7, 1997. Before written rebuttal submissions could be exchanged, however, counsel for Canada corresponded with the Commission on September 5, 1997, to outline the following concerns raised by the First Nation's written submission:

- According to Canada, the First Nation's allegation that the Crown had "failed to set aside sufficient lands for the use and benefit of the Moose Deer Point First Nation" was new and quite different from the allegation that it had been "deprived of the use and occupation of land," and therefore should not be considered by the Commission since it had not been raised in the April 6, 1995, submission to Specific Claims or in the August 30, 1996, planning conference.

- Canada argued that certain evidence relied on by the First Nation was not supported by the sources cited in its submission or merely represented the opinions of researchers working on the First Nation's behalf, making it difficult for Canada to check and substantiate the First Nation's conclusions.

- After agreeing to dispense with oral testimony from elders, the First Nation in its written submission relied on statements taken from United Anishnaabeg elders, including elders from the Moose Deer Point First Nation, concerning treaties such as the 1923 Williams Treaty, a process that did not provide Canada with an opportunity to check these statements against corroborating evidence or to argue regarding the weight that should be attached to them.

Canada contended that the Commission should have no regard for the new allegation of liability or the unsupported evidence, and that the elders' statements should likewise not be considered unless there would be an opportunity to question the elders or to obtain full particulars of their statements, including transcripts, if available.[9]

Counsel for the First Nation responded on October 29, 1997, after receiving information regarding the source of the elders' statements. He argued that the Crown's failure to set aside sufficient land was subsumed in its obligation to protect the First Nation in its use and occupation of lands from European encroachment, an obligation that has typically been resolved by setting aside lands for the sole use and benefit of a band. In denying that this allegation constituted a new claim, he noted that Canada had responded to the claim by arguing that any promises made to the First Nation had been fulfilled by Canada's provision of IR 79 in 1917. He also provided a point-by-point response to Canada's challenge to the conclusions drawn by the First Nation's researchers, and noted that Canada had been in possession of the elders' statements for over a year. He added that the interviewed elders were no longer living.[10]

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[9] Laurie Klee, Counsel, DIAND Legal Services, Specific Claims, Department of Justice, to Ralph Keesickquayash, Associate Legal Counsel, Indian Claims Commission, September 5, 1997.

After a conference call among counsel and the Commissioners on November 12, 1997, the Commission informed the parties on January 28 and February 4, 1998, of its decision that the "new" allegation regarding insufficient lands being set apart for the use and benefit of the First Nation was properly subsumed within the issues as framed at the August 30, 1996, planning conference. As such, the Commission intended to deal with the issue in its final report.[11] The Commission invited the parties to make oral submissions, and ultimately they did so on April 8, 1998, at the Moose Deer Point Community Hall, following the delivery of written rebuttal submissions by Canada on April 2, 1998, and by the First Nation on April 3, 1998. The documentary evidence, written submissions, transcript from the oral submissions, and the balance of the record in this inquiry are referenced in Appendix A to this report.

This claim turns primarily on historical documents from the 1830s. In particular, the First Nation contends that an August 4, 1837, address by the Chief Superintendent of Indian Affairs amounted to a treaty applicable to the present circumstances of Moose Deer Point First Nation. However, the First Nation's 1995 submission to the Specific Claims Branch, its 1997 written submission to the Commission, and the accompanying documents and exhibits cover a huge swath of history ranging from the late 1600s to the 1930s. As will be seen in the following section of this report, the Commissioners have been asked to consider a span of time covering some 250 years. Against this historical backdrop, the Moose Deer Point First Nation argues that it has not been provided with the land and presents promised to it by Britain, that it has not been treated equally with other bands in Ontario, and that it has not been protected in its use and occupation of reserve lands and other lands for traditional purposes.[12]

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[10] Gary A. Nelson, Berger & Nelson, Barristers & Solicitors, to Ralph Keesickquayash, Associate Legal Counsel, Indian Claims Commission, October 29, 1997.

[11] Ralph J. Keesickquayash, Associate Legal Counsel, Indian Claims Commission, to Gary Nelson, Berger & Nelson, Barristers & Solicitors, and Laurie Klee, Counsel, DIAND Legal Services, Specific Claims, Department of Justice, January 28, 1998; Ralph J. Keesickquayash, Associate Legal Counsel, Indian Claims Commission, to Gary Nelson, Berger & Nelson, Barristers & Solicitors, and Laurie Klee, Counsel, DIAND Legal Services, Specific Claims, Department of Justice, February 4, 1998.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. The Order in Council directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[13]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy – Specific Claims.*[14] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the guidelines provided in *Outstanding Business*:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.

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[12] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, pp. 87-90.

[13] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[14] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85 (hereafter DIAND, *Outstanding Business*)..

ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
iv) An illegal disposition of Indian land.[15]

It should also be noted that, when the original mandate of the Commission was still under discussion, Tom Siddon, at that time the Minister of Indian Affairs and Northern Development, wrote to then National Chief Ovide Mercredi of the Assembly of First Nations setting out the basis for what the Commission has previously referred to as its "supplementary mandate":

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.[16]

The purpose of this inquiry is to inquire into and report on whether, on the basis of the Specific Claims Policy, Canada owes an outstanding lawful obligation to the Moose Deer Point First Nation.

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[15] DIAND, *Outstanding Business*, 20.

[16] Hon. Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991.

PART II

HISTORICAL CIRCUMSTANCES

PREAMBLE

As we have already seen, the claim of the Moose Deer Point First Nation is rooted in the history of its Pottawatomi ancestors, whose traditional territory was wide-ranging. That territory, centred on Lake Michigan, included much of Wisconsin and Michigan as well as the northern portions of Illinois and Indiana (see map 2 on page 10). The Pottawatomi maintained close cultural and political ties with the Chippewa and Ottawa, whose languages are also within the Algonquian (Algonkian) language family. The Three Fires Confederacy, although not the focus of this claim, has been and is associated with these three nations.[17]

Exactly how the First Nation's ancestors happened to settle at Moose Deer Point is not easy to establish. When they first relocated to Canadian territory, some lived with other Indian bands at Coldwater,[18] Beausoleil Island, Christian Island, and Parry Island[19] before leaving to take up residence at Moose Deer Point. However, unlike these neighbouring bands, the Moose Deer Point First Nation is a non-treaty band. No known representatives of the First Nation entered into the Robinson-Huron Treaty of 1850 or the Williams Treaty of 1923, although both treaties dealt with lands in the vicinity of Moose Deer Point. Various efforts by the First Nation to adhere to treaty have to date proven unsuccessful.

Indian Affairs' population figures for the Moose Deer Point First Nation as of December 31, 1997, indicated a total membership of 375, of whom 243 lived off-reserve, 123 lived on the First Nation's IR 79, 8 lived on the reserves of other bands, and the remaining individual lived on Crown

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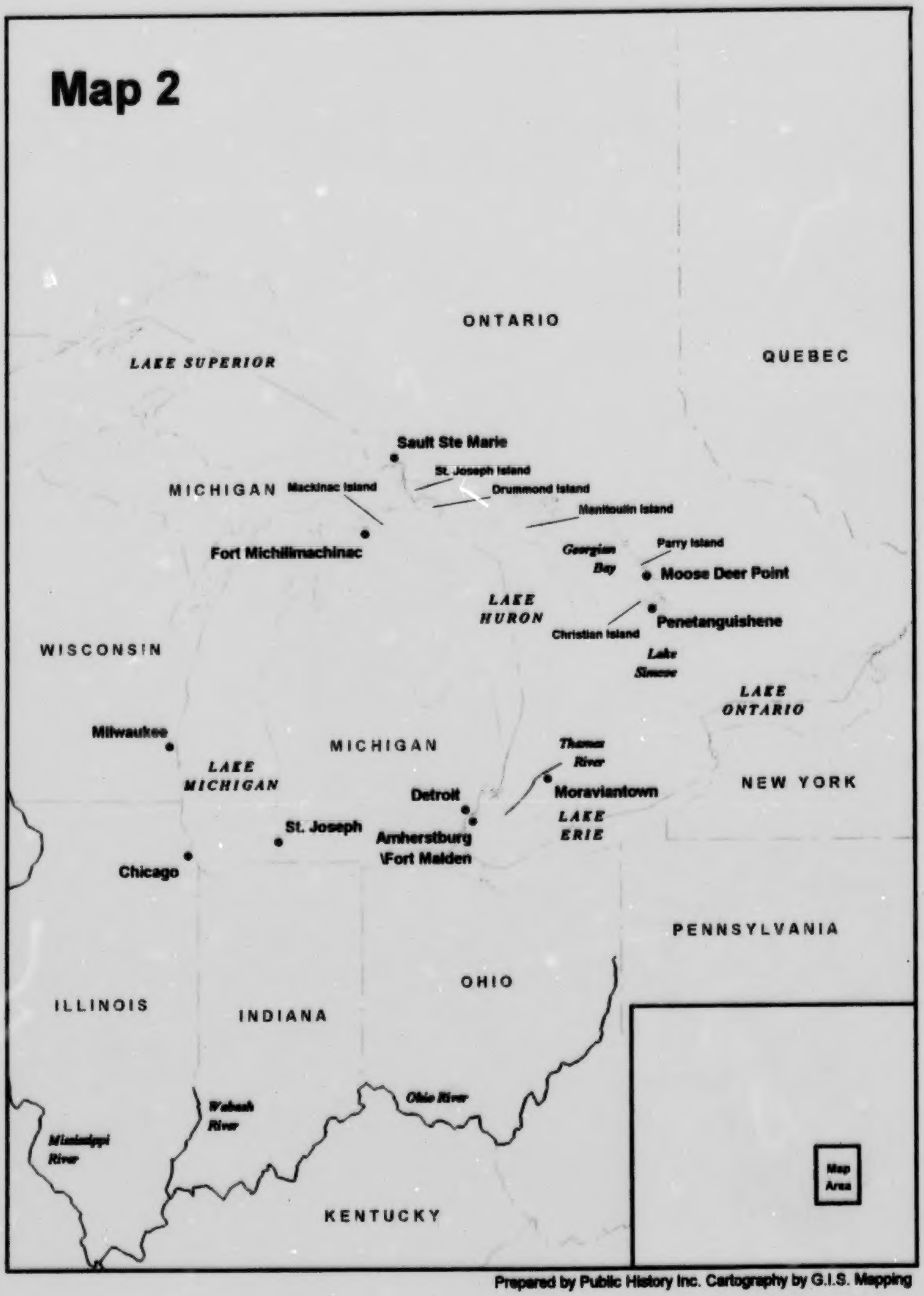
[17] R. David Edmunds, "Potawatomi," in *Encyclopedia of North American Indians*, ed. Frederic E. Hoxie (New York: Houghton Mifflin, 1996), 506; James A. Clifton, "Potawatomi," in *Handbook of North American Indians*, Volume 15: *Northeast*, ed. Bruce G. Trigger (Washington: Smithsonian Institution, 1978), 725 [hereafter Clifton, "Potawatomi," in *Handbook of North American Indian*, vol. 15] (ICC Exhibit 12); Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, pp. 9-10).

[18] C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background and Recommendations," March 1988 (ICC Exhibit 5, p. 7).

[19] C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background and Recommendations," March 1988 (ICC Exhibit 5, p. 9).

Map 2


ONTARIO
QUEBEC
LAKE SUPERIOR
Sault Ste Marie
St. Joseph Island
Drummond Island
MICHIGAN
Mackinac Island
Manitoulin Island
Fort Michilimachinac
Georgian Bay
Parry Island
Moose Deer Point
LAKE HURON
Penetanguishene
Christian Island
Lake Simcoe
WISCONSIN
LAKE ONTARIO
Milwaukee
MICHIGAN
Thames River
LAKE MICHIGAN
Moraviantown
NEW YORK
Detroit
LAKE ERIE
St. Joseph
Amherstburg \Fort Malden
Chicago
PENNSYLVANIA
OHIO
ILLINOIS
INDIANA
Ohio River
Wabash River
Mississippi River
Map Area
KENTUCKY

Prepared by Public History Inc. Cartography by G.I.S. Mapping

land.[20] IR 79, established "for the Pottawatomi of King's Bay" in 1917,[21] consists of three parcels of land that originally amounted to 250.5 hectares (or 619 acres) located roughly 30 kilometres south of Parry Sound and 50 kilometres west of Bracebridge, Ontario.[22]

In this claim, the Moose Deer Point First Nation alleges that the reserve set aside for it in 1917 is insufficient and that economic assistance to the First Nation has been inadequate. In seeking treatment similar to that received by its neighbours, the First Nation also asserts that the Crown treated it as a marginal group and failed to protect it.[23] Moose Deer Point member Art Sandy expressed it this way:

> We were allies of the Crown and that's how we came into Canada in the first place. They wouldn't help us keep our own lands in the States so they told us we could come here and we'd be treated the same as other Indians. Well, we got these three little pieces of land but we haven't been treated very well. The Pottawatomi that live on other Reserves got treated the same as the other Indians but those like us never really got the same deal. We don't even have a Treaty to help us out. That's not fair.[24]

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[20] DIAND, Corporate Information Management Directorate.

[21] C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background and Recommendations," March 1988 (ICC Exhibit 5, p. 18). Footnote 34 refers to the following documents from Indian Affairs file 475/30-10-79: "J.D. MacLean[, Assistant Deputy and Secretary, Department of Indian Affairs,] to Albert Grigg, Deputy Minister [of] Lands and Forests, [Ontario Department of Lands, Forests and Mines,] November 21, 1917; *Grigg to MacLean, April 12, 1917*; *Grigg to MacLean, December 12, 1917*; Grigg to W.R. White, [Surveyor, Survey Branch,] Department of Indian Affairs, October 20, 1917; MacLean, to Grigg, December 15, 1917; *MacLean to Grigg, January 11, 1918*; *MacLeanto [C.J.] Picotte, Indian Agent, Penetanguishene, February 18, 1918*." The four italicized documents were not included within the documentary record in this inquiry.

[22] Canada, *Schedule of Indian Bands, Reserves and Settlements* (Ottawa: DIAND, December 1992), 26.

[23] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 89-90.

[24] Art Sandy, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr. I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, p. 96 (ICC Documents, p. 419).

Mr Sandy maintained that his people did not understand what was happening when the reserve was set up.[25] Rather than getting the land the First Nation needed, "we got these three sections – where the people lived – but we didn't get the other parts we used in between or out into the Bay."[26]

As mentioned, the historical documentation supplied to the Indian Claims Commission in connection with this claim covers a 250-year period. Unfortunately, the thread linking the members of the Moose Deer Point First Nation to their American ancestors disappears into the fabric of the broader explanation of why so many Pottawatomi eventually moved to Canadian territory. Finding a direct genealogical link between the First Nation and Indians who were present to hear the August 4, 1837, address by the Chief Superintendent of Indian Affairs is less of a concern than otherwise might have been the case, however, since Canada concedes that the 1837 pronouncement was intended for the Pottawatomi ancestors of the Moose Deer Point First Nation. Nor is there any dispute over the fact that, once certain Pottawatomi relocated to Canadian soil, they faced an ill-defined relationship with respect to other bands, treaties, Indian moneys, and lands reserved for Indians.

POTTAWATOMI RELATIONS WITH EUROPEANS TO THE WAR OF 1812

The French Era, 1600s to 1763

In the 1600s, the exchange of presents between First Nations and European traders was already a recognized diplomatic practice with well-established roots in the traditions of the First Nations. What the Indians had to exchange were food, furs, knowledge of the country, the land itself, and protection. For the Europeans who were competing for dominance in North America, "presents had become decisive in Indian diplomacy, for Indian allies provided the critical margin of victory in time of war, and the necessary precondition to prosperity in peacetime."[27]

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[25] Art Sandy, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, pp. 96-97 (ICC Documents, pp. 418-19).

[26] Art Sandy, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, pp. 96-97 (ICC Documents, pp. 418-19).

[27] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 13).

Throughout the first half of the 18th century, the Pottawatomi generally allied with the French and the Huron in wars against the Iroquois and the British. In the 1750s, during the war between France and Britain for empire, the Pottawatomi fought their Indian enemies and made war on English settlements.[28] After France had been defeated in North America in 1760 and the British had assumed responsibility for protecting France's Indian allies in their lands, the Pottawatomi allied with the British.[29] When France ceded New France and all of its territory east of the Mississippi to Britain by the Treaty of Paris in 1763, the Pottawatomi's war against intruding settlers south of the Great Lakes did not end. Throughout Pontiac's Rebellion in 1763, the subsequent struggle for the Ohio Valley, and the War of 1812, the Pottawatomi continued to resist the encroachment of American settlers on their traditional territory.

Early British Indian Policy and Practice, 1750s and 1760s

The formal beginning of the British Indian Department under Crown prerogative began with the appointment in 1756 of Sir William Johnson to the position of "Colonel, Agent and Sole Superintendent of the Affairs of the Six Nations, and other Northern Indians."[30] The Articles of Capitulation surrendering Montreal and Quebec provided that "the Savages or Indian allies of His Most Christian Majesty [France] shall be maintained in the lands they inhabit, if they choose to reside there; they shall not be molested on any pretence whatever. . . ."[31] Johnson observed that, as this protection afforded the British "a connection with many [Indian] Nations, with whom before we had no intercourse . . . we should cultivate a good understanding with them, for the security of, and the safety of the public."[32] In this vein, Britain set out to recruit Pottawatomi and other Indian allies through the delivery of annual presents.

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[28] J. Norman Heard, "Potawatomi Indians," in *Handbook of the American Frontier: Four Centuries of Indian-White Relationships*, Volume II: *The Northeastern Woodlands* (Metuchen, NJ: Scarecrow Press, 1990), 300; Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15, 727-28, 730-31 (ICC Exhibit 12).

[29] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, p. 1).

[30] Robert S. Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774-1815* (Toronto: Dundurn Press, 1992) (ICC Exhibit 4, pp. 27-28) [hereafter Allen, *His Majesty's Indian Allies*]. Johnson's successful defence against the French at Lake George (New York) in 1755 earned him the title of Sir William Johnson.

[31] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 31-32).

Once France had been defeated in North America, the commander of British forces there, Sir Jeffery Amherst, ordered an end to the giving of presents both to eliminate the expense and to guard against any gaining of Indian friendship through what he termed "bribery."[33] This action, taken in an atmosphere of uncertainty exacerbated by the activities of unscrupulous traders and speculators, helped bring about "Pontiac's Rebellion" during the summer of 1763. "Pontiac's War," as it is also called, was a coordinated series of Indian attacks that brought down eight British forts and resulted in the deaths of 2000 settlers.[34]

The *Royal Proclamation*, issued by George III in October 1763, declared the Great Lakes area beyond the Appalachian Mountains to be Indian territory. It was to be strictly off limits to settlers until Indian interests in the land had been formally surrendered to the Crown. At a council of 24 Indian nations assembled at Niagara in August 1764, Johnson conveyed this news to the "Iroquois Confederacy" and the "Western Confederacy."[35] The Indian Nations at the Niagara council pledged their loyalty and future military assistance to Britain, and the British extended the symbolic "Covenant Chain," developed earlier through relations with the Iroquois, to include the "western" nations that had previously been independent or allied with France.[36] Britain further promised annual presents to its Indian allies to secure their loyalty.[37] A wampum belt signifying and preserving these new alliances made at Niagara in 1764 was, at Johnson's request, kept by the Ojibwa at Mackinac.[38]

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[32] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 30).

[33] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 32). Amherst thought a more secure way to keep the tribes quiet was to deprive them of supplies, shot, and powder. Eager to "reduce" the disaffected tribes, Amherst even went so far as to inquire about infecting them with smallpox. British Library, Add. Mss. 21364 (Bouquet Papers), Sir Jeffery Amherst to Colonel Henry Bouquet, no date. Bouquet, the commander of the western posts, replied to Amherst, agreeing to the suggestion. British Library, Add. Mss. 21364 (Bouquet Papers), Colonel Henry Bouquet to Sir Jeffery Amherst, July 13, 1763; Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File, 1985), 106.

[34] R. David Edmunds, "Potawatomi," in *Encyclopedia of North American Indians*, ed. Frederic E. Hoxie (New York: Houghton Mifflin, 1996), 506; Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15, 728 (ICC Exhibit 12); Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File, 1985), p. 108. Pottawatomi were involved in the siege of Fort Detroit and the capture of Fort St Joseph in southern Michigan.

[35] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, p. 2). The "Iroquois Confederacy" was joined on this occasion by the Nanticoke, Conoy, and Mohicander; the "Western Confederacy" consisted at this meeting of Chippewa, Ottawa, Menominee, Sauk, Fox, Winnebago (also representing Sioux), Huron, Cree, and Kickapoo. The Pottawatomi were associated with the western group.

Settlement by "land-hungry settlers from New York, Pennsylvania, and Virginia" was not entirely controlled but, by giving presents to maintain its alliances with the resident tribes, Britain succeeded in protecting the game-rich region of the Great Lakes for its fur traders for several decades.[39] The "presents" had both symbolic and economic value for people whose livelihood depended on hunting, fishing, and trapping. Typically they consisted of items such as firearms, including gunpowder, ball and shot, flints, and gunsmith supplies and services; domestic goods such as knives, scissors, and kettles; pipes and tobacco; hunting and fishing supplies; tools such as traps, axes, and tents; clothing, blankets, yard goods, thread and awls; and symbolic and cosmetic items including combs, mirrors, ribbons, face paints, bracelets, medals, and flags.[40]

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[36] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, pp. 2-6).

[37] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, pp. 2-6). Williams refers to the promise of presents as "perpetual," but does not provide a citation to support this conclusion.

[38] Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764-1858," DIAND, Claims and Historical Research Centre, Item I-136 (ICC Exhibit 10, pp. 2-6). That Mackinac was the home of the 1764 wampum is of interest when one considers that, during the War of 1812, Superintendent Dickson began his campaign to reinforce the western Indians' alliances with the British at nearby St Joseph.

[39] James A. Clifton, "'Visiting Indians in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 8-9).

[40] James A. Clifton, "'Visiting Indians in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 17-20). Clifton noted at pp. 17-19 (emphasis added) that

> *[r]egardless of American protests to the contrary, firearms, gun flints, powder, ball, shot, gun worms, and gunsmith's supplies and services were the lesser part of these supplies.* More prominent were a dozen and more different kinds of woven goods – Cuddies and Molton (duffle), Rateens and Strouds, Irish Linens and Printed Calicoes, Striped Cottons and Silk Handkerchiefs were some of these, together with Scissors, Thimbles, Needles, Awls, Thread, and a supply of ready made clothing such as Shirts, Jackets, Leggings, Wrappers, Petticoats, Officer's Dress Coats, Hats Plain and Hats with Fancy Lace. Fishing supplies – Hooks, Lines, and Netting were also delivered, as were various types of implements and tools – Axes, Brass and Tin Kettles in various sizes, Tenting, Traps, and Fire Steels. And Blankets – 1 point, 1½ point, 2 point, 2½ point, and 3 point, depending upon the age and importance of the recipient. To accompany all of these necessaries were various symbolic and cosmetic goods: Vermilion for face paint, Combs, Ribbons, Bracelets, Gorgets, Medals, and

Britain's investment in presents was heaviest in years when Indian military assistance was most needed, such as during the American Revolution and the War of 1812.[41] For a variety of reasons, the practice evolved into a predictable pattern of annual distributions at British posts such as Amherstburg, Mackinac Island, Drummond Island, Manitoulin Island, and Penetanguishene. Britain's Indian allies were actively encouraged to expect them.

The American Revolution and the Struggle for Homelands, 1775-94

Among American colonists, the restrictions on westward expansion were as resented as taxes. In 1775, this colonial resistance to British authority erupted in armed rebellion. In 1783, another Treaty of Paris ended the American Revolution, or the War of Independence. The treaty recognized American independence and provided for settlement as far west as the Mississippi River, but made no provision for the Indian allies of the British. South of the border, the Indians were left to fend for themselves in a hostile environment.[42]

The majority of Indians had supported the losing side in the American Revolution because the British had promised to protect their lands and because the Indians regarded American rebels as trespassers.[43] Pottawatomi from what is now Michigan and Indiana generally supported the British; however, some Pottawatomi in Illinois and Wisconsin sided with the Americans.[44] With the American victory, many more fur traders and settlers flooded into the area south of the western Great Lakes, the homeland of the Pottawatomi, Ottawa, Chippewa, Miami, Shawnee, Kickapoo, Fox, Sauk, Winnebago, and Menominee. Settlers displaced and disrupted the tribes; disease and warfare reduced their numbers. Immediately after the American Revolution, in 1784, the Governor of Canada,

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Flags, and Looking Glasses to admire the product with.

[41] Memorandum on "Indian Presents," no author or recipient indicated, September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, p. 348).

[42] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 56); Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File, 1985), 114.

[43] Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File, 1985), 109.

[44] R. David Edmunds, "Potawatomi," in *Encyclopedia of North American Indians*, ed. Frederic E. Hoxie (New York: Houghton Mifflin, 1996), 506.

Frederick Haldimand, offered asylum in British North America to dispossessed Indian loyalists.[45] The main response to this invitation at that time was by the Iroquois.

His Majesty's Indian allies who remained in the United States after the Revolution continued to fear both the loss of their lands and retaliation by Americans for their support of the British. Indeed, tribes in the Ohio Valley were shocked to learn that their lands had been ceded by the British King to the Americans.[46] Even worse, the Americans maintained that they had forfeited their aboriginal title simply by fighting with the British.[47] The Indians fought Americans for another decade in an unsuccessful effort to defend their homelands.[48]

By 1800, more than one hundred Pottawatomi villages were dispersed over a wide area owing to the effects of warfare, population expansion, the fur trade, the clan system, and internal cultural pressures, all of which contributed to the breakup of larger villages. Thus, the most important geopolitical unit for the Pottawatomi was the village, the product of the migration of clans and clan segments into new territories.[49]

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[45] Robert Surtees, *A Cartographic Analysis of Indian Settlements and Reserves in Southern Ontario and Southern Quebec, 1763-1867* (Ottawa: DIAND Publication QS-3414-000-EE-A1, 1985) (ICC Exhibit 18, pp. 37-38); Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 58).

[46] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 59).

[47] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 59). At p. 80, however, Allen notes that about 10 years later the Americans admitted that they had merely obtained the right to acquire Indian land through formal negotiation and purchase.

[48] Pottawatomi participated in the struggle for the Ohio Valley and defeated Americans attacking Miami towns in October 1790. Under the leadership of Miami Chief Little Turtle, Pottawatomi warriors probably were involved in another defeat of the American army south of the Wabash River in November 1791. These particular defeats made the British so nervous that they unsuccessfully attempted to create a buffer zone to the south for the defence of Canada. In particular, in defiance of the 1783 Treaty of Paris, Britain built a well-stocked post, Fort Miami, south of Detroit. In June 1794, Little Turtle's warriors suffered such a serious setback at Fort Recovery that some of his allies from the Lakes defected. The strategy of the British Indian Department and military was to reassure those still with Little Turtle that they had resources at Fort Miami. But, in August 1794, at the Battle of Fallen Timbers, the British literally closed their doors, abandoned their Indian allies, and failed to deliver on their many promises of military assistance. The tribes were smashed and had to surrender the Ohio Valley by the Treaty of Greenville in 1795. Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 71-76 and 82-84).

[49] Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15, 731-32 (ICC Exhibit 12).

Offer of Asylum in Canada, 1795

In 1795, fearing future aggression from the United States and wanting to develop the British-Indian association vital for the defence of Canada, Lieutenant Governor Sir John Graves Simcoe renewed the offer of asylum in Canadian territory to Indians living within the United States.[50] At that time, however, fewer came than the British expected.[51]

When Britain gave up the last of its western posts in American territory in 1796,[52] it began building three replacement forts in Canada: Fort Malden, Fort George, and Fort Joseph.[53] The Indian Department instructed its superintendents at the three new posts to promote friendship between the troops and the Indians and to keep careful records of the Indians' "disposition," any public speeches to them, and all transactions with them.[54] At Fort Malden (Amherstburg), the commander, Captain Hector McLean, opposed using presents as subsidies to encourage American Indians to visit and settle in Canada. He expected that those who came would become a burden on the government because subsidies would turn them "effeminate and indolent."[55]

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[50] After the Battle of Fallen Timbers (see footnote 48) the offer of asylum was a way to placate the Indians' anger over Britain's betrayal of its promises.

[51] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 36-37). By 1796, the Mississauga in Canada had also become disillusioned with the British – whom the Indians then considered being "as bad as the Americans" – for taking away Indian lands for United Empire Loyalists and other settlers. Mohawk leader James Brant bitterly complained that "the poor Indians have been left in the lurch." Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 92-93).

[52] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 82-84).

[53] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 89-90). Fort Malden was situated at Amherstburg, between Lake Erie and Lake St Clair on the Detroit River; Fort George between Lake Erie and Lake Ontario on the Niagara River; and Fort Joseph on St Joseph Island between Lake Huron and Lake Superior in the mouth of the St Mary's River.

[54] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 90).

[55] James A. Clifton, "'Visiting Indians in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 36).

Councils at Amherstburg, 1808 and 1810

Complicated by the eruption of war in Europe, Anglo-American relations deteriorated steadily after 1803.[56] Americans feared British-instigated Indian attacks on their frontier settlements, while officials in Canada cultivated the Indians' loyalty in preparation for an attack by the Americans. In the autumn of 1808, the superintendent at Fort George, William Claus, held a council of 5000 warriors and chiefs, mostly from the United States, at Amherstburg (the main Indian centre in the province) to let the Indians know that, if peace with the United States was not possible, the Indians and the British would together regain the country taken from them.[57] The message was so popular that, for the next two years, tribal delegates constantly visited the British at Amherstburg to pledge their support and to receive gifts and provisions in return.[58] In 1810, Pottawatomi were among the 2000 Indians who came and announced they were ready to "defend [our Country] ourselves" with supplies from the British.[59]

When the United States formally declared war on Great Britain on June 18, 1812, Britain's commitments in Europe, India, and South Africa meant that soldiers and provisions were in short supply for operations in Canada.[60] For this reason, Britain's employment of Indian allies proved to be "the single most important factor in the successful defence of Upper Canada."[61]

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[56] The British navy interrupted shipping to the United States, and an 1807 British attack on the American frigate *Chesapeake* escalated anti-British feelings. Meanwhile, a militant Indian Confederacy was forming in western Ohio and Indiana under the Shawnee Prophet or Tenskawatwa. Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 108-11).

[57] In Canada, the Six Nations and the Mississauga were not especially interested in this message. Although Tenskawatwa did not attend, his many followers did, along with Tecumseh, his influential brother who had fought with Little Turtle at the Battle of Fallen Timbers. Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 112-15).

[58] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 115).

[59] The British were chagrined because they did not want the Indians attacking Americans without a declaration of war between Great Britain and the United States. Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 115-16).

[60] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 119-20).

[61] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 120).

The War of 1812

Of the 10,000 Indians aligned with the British in 1812, more than 8000 were "western Indians," including some 2000 Pottawatomi, living in the United States.[62] That year the British took Michilimackinac (Mackinac) and Detroit with Indian support.[63] In January 1813, British fur trader Robert Dickson was named superintendent responsible for "Indians of the Nations to the Westward of Lake Huron." To rally the western Indians again, he held a series of councils and, in July 1813, arrived at Detroit with so many warriors that provisioning from Fort Malden at Amherstburg became a challenge.[64] Dickson's formal instructions were to renew the "historical bonds of trust and friendship" between the western Indians and the British Crown.

Dickson appealed to the western Indians' hatred for aggressive American territorial ambitions. He made frequent reference to the wampum belt and Sir William Johnson's 1764 promise at Niagara that the king "never would forsake or abandon" them. He distributed wampum belts, flags, and medals of King George, which were earnest symbols of the alliance between the bands and the British Crown. Moreover, the speech that the Indian Department required him to deliver pledged the loyalty of the Crown to the Indians in the clearest of terms.[65]

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[62] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 121-22 and Appendix B). There appear to be some minor discrepancies in the numbers reported in Allen's summary on pp. 121-22 and in the Appendix.

[63] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 128-30 and 137-40). Ogemawahj, the Pottawatomi immigrant from whom most Pottawatomi of the Moose Deer Point First Nation claim descent, is thought to have been involved in the battle for Mackinac. Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, p. 25, and footnotes 9 and 10). From the footnotes, the exact source of this information is not clear. In fact, within footnote 9, Koennecke states: "[I]t is more likely Ogeemawatch/Quasing had been involved in the 1812 taking of Mackinac from the surprised American troops who had not even known the war had started."

[64] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 140-44).

[65] In part, Dickson stated:

> But my Children, I have not nor will I lose hold of the Belt which has been so long among you from Sir William Johnson – on the contrary, I will now make it stronger by the Belt which I now present to you, and never will I leave you but as Your Father, see that Justice is done to you by the Big Knives [Americans] and that your hunting Grounds shall be preserved for your use, and that of your Children agreeably to the Treaty made at Gre[e]nville with their General Wayne some years ago [1795]. – My Children, with this Belt I call upon you to rouse up your young Warriors and join my Troops with the red Coats, and your ancient Bretherin the Canadians, who are also my Children, in order to defend your and our Country. . . .

Much to the surprise of Tecumseh and the Confederacy of Shawnee, Pottawatomi, Ottawa, Ojibwa, Winnebago, Sauk, and other tribes that had rallied at Detroit, the British troops withdrew from Amherstburg as soon as the Americans gained control of Lake Erie.[66] As the British soldiers retreated along the Thames River, Tecumseh's warriors faced and fought the American cavalry for an hour until the famous warrior's death there on October 5, 1813, at the Battle of Moraviantown.[67]

The final outcome of the War of 1812 was that, through the Treaty of Ghent on December 24, 1814, the ambitions of the Indians and the Canadians were disregarded in the interest of renewed cordiality in Anglo-American relations.[68] For example, Fort Michilimackinac, which was vital for the preservation and defence of British interests in the Northwest and which Americans ignored for most of the war, was turned over to the United States troops in July 1815.[69]

SITUATION AFTER THE WAR OF 1812

Presents

On the same day that the British vacated Michilimackinac, some Pottawatomi signed a peace treaty with the United States government that required the Indians to desist from hostilities.[70] Other tribes also made peace with the American government,[71] but that fact did not prevent Britain's former Indian allies from continuing to visit the British to collect the annual presents distributed at

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> My Children, listen not to the Songs of wild birds who may tell you that the English will make Peace with the Enemy when it suits their own convenience without consulting your Interest. *My words* are pledged to you that this will never happen.

Speech of Robert Dickson Esquire to Indian tribes, 18 January 1813, in Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 223-24).

[66] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 144-45). In 1814, Major General Procter was court martialled and reprimanded for his retreat from Fort Amherstburg and the Battle of Moraviantown.

[67] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 144-46).

[68] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 166, 168-71).

[69] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, pp. 155-65).

[70] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 169).

[71] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 169).

Amherstburg (Fort Malden) and the new post at Drummond Island, located between the northeastern tip of Michigan and Manitoulin Island.

The Drummond Island Indian agency under Superintendent Thomas Gummersall Anderson was noteworthy because of Anderson's close connections to both the Pottawatomi and the "civilization" plans of the British Indian Department. Anderson distributed presents there from 1815 until 1828, when the Boundary Commission put Drummond Island on the American side and the British had to evacuate.[72] In 1829, Anderson distributed the British presents at nearby St Joseph Island while he was in the process of moving the agency to Penetanguishene.[73]

In 1828, three-quarters of the 9422 Indians who received presents at Drummond Island and Amherstburg were from the United States.[74] When Anderson was pulling out of the area around Mackinac in 1829, Wisconsin Pottawatomi asked him if they could count on British support for another western Indian action "to crush" the Americans whom they had learned were intending to force them west of the Mississippi. No help was forthcoming, however, because Britain wanted peace.[75]

Present-giving proved to be a controversial system for keeping peace. On the British side alone, it was fraught with confusion and abuse:

> British officials . . . were never of one uniform mind about the meaning and merit of the custom. It always had its detractors as well as its supporters. Those regularly favoring presents tended to be the agents and officials most directly involved . . . particularly the local superintendents and storekeepers with the strongest vested interests. . . . In contrast the critics were generally high placed officers, particularly

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[72] Anderson was also the Customs Collector – a lucrative position "often held by members of leading families" – at Drummond Island until 1828. His counterpart at Amherstburg, John Wilson, was dismissed in 1831 after 14 years at that point of entry. Frederick H. Armstrong, *Handbook of Upper Canadian Chronology* (Toronto: Dundurn Press, 1985), 217-20.

[73] James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potawatomi into Upper Canada, 1830 to 1850*, Canadian Ethnology Service Paper No. 26 (Ottawa: National Museums of Canada, 1975) [hereafter Clifton, *A Place of Refuge*] (ICC Exhibit 13, p. 119); Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 44.

[74] Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 25-26).

[75] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 28).

> those in branches of government outside the Indian Department such as the Military and the Treasury.[76]

The highest British authorities believed presents were "a matter of charity, equity and generosity, not a legal obligation."[77] The Indian allies, once regarded by the British as "western Indians," became "visiting Indians."[78] The Indian allies viewed the annual presents as their legitimate due for past and possible future services performed in the British interest and even for lands they had lost.[79]

American Treaties and Removal, 1830s

In 1830, the United States government passed the *Indian Removal Act* to relocate eastern American tribes west of the Mississippi River. Indians who refused to go were left with cramped reserves in their traditional homelands or, more often, with nothing. In the wake of the Black Hawk War of 1831 and the depletion of game in Illinois and Indiana, the Pottawatomi were ordered out of Illinois in 1832. Several hundred left for Indiana and requested assistance to move westward, but, after viewing the proposed new location, only a few dozen actually completed the move at that time. Subsequently, by means of the 1833-34 Treaties of Chicago with the "United Bands of Ottawa, Chippewa, and Potawatomi," the American government induced the Pottawatomi to cede all their remaining lands in the Lake Michigan area for other lands in Iowa. The Pottawatomi were allowed to stay in Illinois, Indiana, Michigan, and Wisconsin for another three or four years until militia units forced as many Pottawatomi as they could find to march west.[80] Still, this group constituted less than half the total

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[76] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 22-23).

[77] James A. Clifton, "'Visiting Indians in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 29).

[78] The British-originated terms "visiting Indians" and "resident Indians" are problematic in that they do not reflect the international border's lack of importance to most of the Indians of the Great Lakes region. The use of these conceptually flawed terms throughout this report arises from their frequent appearance in the historical documents and not from any belief that their meaning is fair to all parties.

[79] James A. Clifton, "'Visiting Indians in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 29).

[80] Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15, 728 (ICC Exhibit 12); Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 30-32, 43-44); Franz M. Koennecke, "The Anishinabek of Moose Deer

Pottawatomi population, and many of those who moved west later moved back to Wisconsin and Michigan.[81]

In 1837, all Pottawatomi remaining in the Lake Michigan area effectively became refugees. They had no lands, no cornfields, and no safe hunting grounds, and the American government stopped paying annuities to all except those who had made the move across the Mississippi.[82] Ultimately, fewer than half stayed west of the Mississippi, but many moved into Canada around 1837 to avoid removal.[83] Anthropologist James Clifton estimates the number of Pottawatomi who moved to and stayed in Canada at about 3000, or "about one-third of the total tribal population in the 1830s."[84]

The Policy of Civilization and Christianization, 1830-35

In the late 1820s a reorganization of the Indian administration reintroduced civil authority, split the department on provincial lines, and created five superintendencies in Upper Canada.[85] This arrangement lasted through the union of Upper and Lower Canada in 1841 and until the next reorganization, which began around 1845.[86] In Upper Canada, Sir John Colborne held the post of Lieutenant Governor from 1830 until late 1835, when he was succeeded by Sir Francis Bond Head for 1836 and 1837 and Sir George Arthur from 1838 to 1841. The Chief Superintendents of Indian Affairs during this period were Colonel James Givins from 1830 to 1837 and Samuel Peters Jarvis from 1837 to 1845.[87]

In about 1830, Colborne initiated an official Indian policy of civilization and Christianization, which involved establishing model Indian villages at places such as Sarnia and Coldwater and leasing

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Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, p. 17).

[81] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 31).

[82] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 32).

[83] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 32).

[84] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 34).

[85] Central, Western, Coldwater and the Narrows, Carradoc and Moravian reserves, and Six Nations.

[86] After February 1841, Upper Canada became "Canada West."

[87] Douglas Leighton, "The Compact Tory as Bureaucrat: Samuel Peters Jarvis and the Indian Department, 1837-1845" (March 1981) 72:1 *Ontario History*, 40-41.

and selling Indian lands.[88] The Coldwater settlement, located between Georgian Bay and Lake Simcoe and operating under the direction of the influential Superintendent Thomas Anderson, lasted less than six years from its inception in 1830. At the time the Coldwater civilization project was announced in 1829, Manitoulin Island had been regarded as an alternative site to the Penetanguishene/Coldwater area.[89]

Anderson had moved his agency from Drummond Island[90] to Penetanguishene in 1829 and to nearby Coldwater in 1830, and he distributed presents at Coldwater and Penetanguishene until 1835. By early 1837, after the demise of the Coldwater project, he became responsible for establishing a new agency on Manitoulin Island (see map 3 on page 26).

The Coldwater project had involved constructing an agency building at Coldwater and houses with agricultural plots for Indians along a road cut for the project from Coldwater to the Narrows of Lake Simcoe (Orillia). Three Chippewa bands under Chiefs William Yellowhead (Musquakie), Snake, and John Aisance (Assance) participated in this endeavour, along with a fourth group

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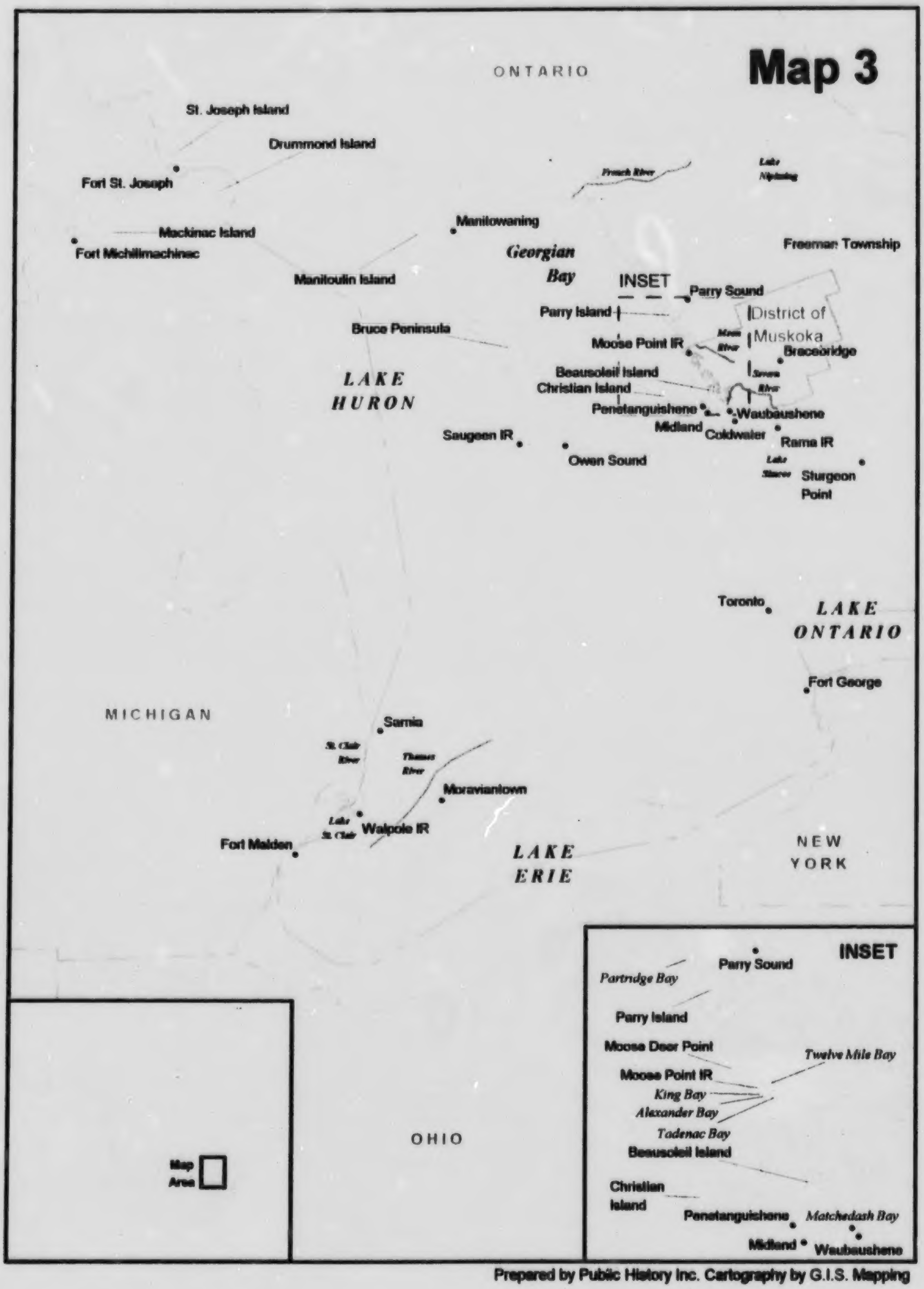
[88] Robert J. Surtees, "Indian Land Cessions in Ontario, 1763-1862," PhD thesis, Carleton University, 1982 (ICC Exhibit 17, pp. 31-32); Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992), 234.

[89] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 101-03 and 110-11.

[90] Anderson's house at Drummond Island was called "Pottawatomie Hall" by Lieutenant-Colonel Robert McDouall, who had commanded Michilimackinac after 1813 and had arranged for Anderson's appointment to the Indian Department. Anderson, a Canadian-born son of a Loyalist lawyer from Boston, was originally from Cornwall on the St Lawrence River. He began as a fur trader based at Mackinac and operating on the Mississippi River west of Milwaukee. There, he was the partner of Robert Dickson, who had revived the western Indian-British alliance in 1813. For his role in taking Prairie du Chien from the Americans in 1814, Anderson was appointed to the Indian Department and allowed to retain his military rank of captain. Anderson's father had been a captain in the regiment of Sir John Johnson, Superintendent of Indian Affairs from 1782 to 1828, during the Revolutionary War. Afterwards, his father served as a judge of the Surrogate Court and of the Eastern District Court until 1814. Anderson's brother married into the family of the first Chief Superintendent of Indian Affairs appointed under Canadian authority, P.M. Vankoughnet, who served from 1860 to 1862. Mrs S. Rowe, "Anderson Record from 1699 to 1896" (1905) VI Ontario Historical Society, *Papers and Records*, 113-14, 116, 128; Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 90 and 106-07); Douglas Leighton, "The Compact Tory as Bureaucrat: Samuel Peters Jarvis and the Indian Department, 1837-1845" (March 1981) 72:1 *Ontario History*, 40-53.

Map 3


ONTARIO
St. Joseph Island
Drummond Island
Fort St. Joseph
French River
Lake Nipissing
Mackinac Island
Fort Michilimachinac
Manitowaning
Georgian Bay
Freeman Township
Manitoulin Island
INSET
Parry Sound
Parry Island
District of Muskoka
Bruce Peninsula
Moon River
Moose Point IR
Bracebridge
LAKE HURON
Beausoleil Island
Christian Island
Severn River
Penetanguishene
Waubaushene
Midland
Coldwater
Rama IR
Saugeen IR
Owen Sound
Lake Simcoe
Sturgeon Point
Toronto
LAKE ONTARIO
Fort George
MICHIGAN
Sarnia
St. Clair River
Thames River
Moraviantown
Lake St. Clair
Walpole IR
Fort Malden
LAKE ERIE
NEW YORK
OHIO
Map Area
INSET
Parry Sound
Partridge Bay
Parry Island
Moose Deer Point
Twelve Mile Bay
Moose Point IR
King Bay
Alexander Bay
Tadenac Bay
Beausoleil Island
Christian Island
Penetanguishene
Matchedash Bay
Midland
Waubaushene

Prepared by Public History Inc. Cartography by G.I.S. Mapping

variously referred to in historical records as either "a band of Pottiwatamies from Drummond Island"[91] or "Potaganasee Ojibwa from Drummond Island."[92]

The failure of the Coldwater project has been attributed to various internal and external factors. Among them were religious rivalries among the Indian groups that had been converted to the Anglican, Methodist, or Roman Catholic faiths. Non-native encroachment, owing to the short-cut the road offered to Lake Huron, was another. The Indians' fear of disease from proximity to whites[93] and their continued interest in hunting, fishing, and trapping gave them still other reasons to continue what Superintendent Anderson's daughter characterized as their "wandering habits."[94] Following the project's demise, its houses went to ruin as many Indians at the Narrows moved to Rama and others from Coldwater relocated to Beausoleil Island.[95] At about the same time, incoming Lieutenant Governor Head initiated his scheme for congregating as many Indians as possible at Manitoulin Island.

Before any official announcement of Head's plan, a small group of "heathen" Pottawatomi had already taken up residence at Manitowaning on Manitoulin Island. Anderson thought they had located there in about 1833. Because they were few in number, they raised no immediate questions of policy with regard to rations or land on which they could settle.[96]

In 1834, Anderson advised Chief Superintendent Givins that some Chippewa Ottawa, and Pottawatomi living in the United States had asked to settle on Manitoulin Island. Expecting that half of them would relocate, Anderson assured Givins that "we will send them proper teachers from our Church."[97] In September of the following year, Anderson wrote Lieutenant Governor Colborne about the desire of these Indians to settle in Upper Canada. Anderson felt that the British had a moral debt to the Indians and that it would be worthwhile to concentrate them on Manitoulin Island:

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[91] Sir Charles Bagot, "Report on the Affairs of Indians in Canada," March 20, 1845 (ICC Documents, pp. 27-29).

[92] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 103 and 153-54.

[93] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 188.

[94] Mrs S. Rowe, "Anderson Record from 1699 to 1896" (1905) VI Ontario Historical Society, *Papers and Records*, 130.

[95] Mrs S. Rowe, "Anderson Record from 1699 to 1896" (1905) VI Ontario Historical Society, *Papers and Records*, 130; Sir Charles Bagot, "Report on the Affairs of Indians in Canada," March 20, 1845 (ICC Documents, pp. 26-29).

[96] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 65).

> [O]f late years the distribution of presents at Penetanguishene has brought to the vicinity of Coldwater many of the more distant tribes and their visits to the settlement have been frequent. . . .
>
> Tribes of our Indian allies are Driven from the United States territory and are claiming your protection. . . .
>
> Our Indian allies emigrating from the United States and seeking our protection as well as the British Indians whose means of subsistence are exhausted have claims on our humanity which would most easily be satisfied by forming one extensive establishment for the purpose of leading them to the arts of civilized life. . . .
>
> The Manitoulin, an Island on the North side of Lake Huron in extent about one hundred miles by thirty, appear[s] to be the most suitable for the purpose.[98]

Colborne supported the general idea of establishing "the Indians of the Northern Shores of Lake Huron" on Manitoulin Island, where Anderson, together with a missionary and a schoolmaster, would "endeavor to civilize the Tribes which may be attracted to place themselves under their Charge."[99]

Early in the summer of 1835, 215 Chippewa and Pottawatomi from the Milwaukee area on Lake Michigan, many of whom had served the British in the War of 1812, travelled to Penetanguishene. They too informed Anderson that they had "come to reside and seek protection."[100] In response to Anderson's request for instructions, it seems that Chief Superintendent Givins's reply on July 29, 1835, gave permission to "afford them asylum" in the province.[101]

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[97] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 65). Clifton's source for the quote is simply "RG 10, vol. 2789." Anderson was a staunch Anglican.

[98] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90); T.G. Anderson, Indian Superintendent, Coldwater, to Sir John Colborne, Lieutenant Governor, September 24, 1835, in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, pp. 1-2). The reference cited by Koennecke is National Archives of Canada (NA), RG 10, C-11019, vol. 59, at pp. 59866, [59]897, [59]900, [59]901, and [59]904.

[99] Robert J. Surtees, *Treaty Research Report: Manitoulin Island Treaty* (Ottawa: DIAND, 1986), 5.

[100] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 65).

[101] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 65). Clifton's cite for this short quote is "RG 10, vol. 2789." Research notes supplied to the Commission as "Pottawatomie Correspondence Collected by Franz Koennecke"

Head's Plan for the Indians of Upper Canada, 1836

In November 1835, Colborne was replaced by Head, to whom the Colonial Office looked for recommendations on how to manage Indian affairs. Head therefore made a tour of most of the Indian settlements in Upper Canada to "judge . . . the actual situation of that portion of the Indian population which is undergoing the operation of being civilized." In the summer of 1836, he attended the annual delivery of presents to the "visiting Indians" at Amherstburg and, for the first time, on Manitoulin Island.[102]

Whatever the challenges posed by the northerly and waterbound location of Manitoulin Island, thousands of Indians arrived there to receive presents and, it turned out, to surrender Manitoulin Island and the Bruce Peninsula. At a formal council of about 1500 Indians of "various tribes" at Manitowaning on August 9, 1836, Head secured for the Crown and set aside both Manitoulin Island and the Bruce (Saugeen) Peninsula for the settlement and "civilization" of Indians.[103]

The Ottawa and Chippewa gave up a series of "23,000" islands, including Manitoulin, with a view to making "them the Property (under your Great Father's Control) of all Indians who he shall allow to reside on them."[104] The Saugeen (Sauking) Indians gave up "a million and a half acres [607,028 hectares] of the very richest land in Upper Canada" and were to "repair either to this Island [Manitoulin] or that Part of [their] Territory which lies in the North of Owen's Sound."[105] Wampum was exchanged, the alliances and commitments made at the 1764 Council at Niagara were invoked, changing circumstances were acknowledged, and the solemn proceedings were duly witnessed by

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(ICC Exhibit 15, p. 1) suggest that there is "an unsigned note on a second page" saying: ". . . the Indians may remain under our protection and have land offered to them, but that there are no funds at the disposal of the Govt. to enable them to cultivate or to furnish them with. . . ." The reference cited is NA, RG 10, vol. 58, C-11019, pp. 59677-79.

[102] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 1).

[103] The August 9, 1836, treaty with Ottawa and Chippewa involving Manitoulin Island and all other islands on the north shore of Lake Huron is known, by Indian Affairs' consecutive numbering system, as Treaty 45. The treaty of the same date with the Sauking Indians was a corollary to this treaty and was designated Treaty 45½.

[104] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 5-6); Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992), 237-38; Surtees, *Treaty Research Report: The Manitoulin Treaties*, 11.

[105] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 5-6); Surtees, *Treaty Research Report: The Manitoulin Treaties*, 11.

officials of the government and various religious denominations. No payment was made to the Indians for the lands they yielded to the government. The Indians were simply promised that Manitoulin Island and the Bruce Peninsula, together with their fisheries, would be protected from encroachment by settlers and that the Indians there would be given assistance with agriculture. No annuities flowed to the signatory bands from these agreements.[106]

In connection with his visit to Amherstburg that same summer, Head took smaller surrenders of "rich land" from the Huron and "Moravian Indians."[107] Of these, he remarked:

> I need hardly observe that I have thus obtained for his Majesty's Government from the Indians an immense portion of most valuable land, which will undoubtedly produce, at no remote period, more than sufficient to defray the whole of the expenses of the Indians and the Indian department in this Province.[108]

Head's primary mission was to save the government money by reducing expenditures for Indians.

After this tour, Head sent Colonial Secretary Lord Glenelg his plan for the management of Indian Affairs in Upper Canada. Rejecting the previous efforts to Christianize and civilize Indians by making them farmers, Head directed that Manitoulin Island and vicinity become a reserve or locale for all the Indians in Upper Canada "to retire or fall back upon."[109] The kindest course, in his estimation, was "to remove and fortify [the Indians] as much as possible from all communication with the Whites."[110]

Much of Head's dispatch from Toronto to the Colonial Secretary on November 20, 1836, appears below. In it, Head also discussed the nature of presents as well as the advantages and disadvantages of giving them. He suggested discontinuing presents to American Indians in three years, anticipating that few Indians would emigrate to Canada as a consequence of this change in policy.[111] He wrote:

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[106] Robert J. Surtees, *Indian Land Surrenders in Ontario, 1763-1867* (Ottawa: DIAND, 1984), 91-92.

[107] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 6).

[108] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 6).

[109] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 6).

[110] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 5).

> I am decidedly of opinion, that his Majesty's Government should continue to advise the few remaining Indians who are lingering in Upper Canada, to retire upon the Manitoulin and other Islands in Lake Huron, or elsewhere towards the North West.
>
> Your Lordship has informed me, that the Committee of the House of Commons on Military expenditure in the Colonies, are of opinion "that the Indian Department may be greatly reduced, if not altogether abolished, and they therefore call the attention of the House to the same, and also to the expense of articles annually distributed to the Indians, and whether any arrangement may not be made to dispense with such distributions in future, or to commute the presents for money."
>
> As it is your Lordship's desire that I should afford you as much information as possible in the above suggestions, I now respectfully endeavor to do so. . . .
>
> The presents which the British Government has been in the habit of granting to the Indians in Upper Canada, have been delivered in two classes, termed "the resident" and "the visiting" whose numbers were this year as follows.

No. of Indians resident in Upper Canada –	6,507
Average No. of I[ndian]s who in order to receive presents from the British Government annually visit Upper Canada from the United States –	3,270
Total [number of Indians receiving presents] –	9,777
Total average annual cost of presents issued as above –	£8,500

> It certainly appears to me very desirable indeed that we should, if possible, discontinue the practice of giving presents to that portion of the visiting Indians who reside in the territory of the neighbouring States, but what is desirable is not always just, and it is therefore necessary, before the project be carried into effect, that we should consider what arguments exists for, as well as against this.
>
> In its favor it may be stated,
>
> 1st. That we should save an annual expenditure of, say, £4,000.
>
> 2ndly. That according to common Laws among Nations, there appears to be no reason why, having lost all dominion over, and interest in, the United States, we should continue to make annual payments to any portion of its inhabitants.
>
> 3rdly. That it amounts almost to an act of hostility for the British Government to continue to give Guns, Powder and Ball, to the Indians of the United States, with whom that People are at this moment engaged in civil war.

---

[111] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 15-16). This address also includes an appeal on behalf of Chief Superintendent Givins, whose "name is so identified with the Indian history of this Country" that Head asks that Givins be retired "on his full pay."

4thly. That a considerable portion of the presents which we give to the Indians, are shortly after their delivery, to be seen displayed for sale by the Shopkeepers of the United States, who often obtain them almost for nothing. . . .

In reply to the first objection, namely, "that by withholding the presents, we should save an annual expenditure of £4000," it may be stated that, of all the money which has ever been expended by the British Government, there is perhaps no sum which ought to be less regretted than that which we have hitherto bestowed upon the Aborigines of America. It has purchased for us the blessing of their race – they love us!! – they have shed their blood for us – they would do so again – they look upon us as the only just and merciful inhabitants of the Old World – and impressed with these feelings their attachment to our Sovereign amounts almost to veneration. "When we see the Sun rise in the East," said a Warrior to me at the Great Council at the Manitoulin Island, "it is our custom to say to our young men there is our Great Father, he warms us, he clothes us, he gives us all we desire."

There can be no doubt that up to the present page in the history of the British Empire, we have acted well towards the Indians. What that reflection may intrinsically be worth, it is not so easy to determine, as every man will perhaps estimate it differently; however, its moral value, whatever it may be, should be deducted from the expense of which we complain, for we cannot enjoy both advantages: if we save the latter we must lose the former. . . .

In reply to the second objection, namely, "that according to common laws among Nations, there appears to be no reason why, having lost all dominion over, and interest in the United States, we should continue to make annual payments to any portion of the inhabitants," it must be recollected that in our Wars with the Americans, we gladly availed ourselves of the services of the Indians, whom invariably we promised we never would desert. In these promises we made no restriction whatever, as to domicile; when the tribes joined us, we never waited to ask them whence they came[;] the close of the War when the surviving Warriors left us, we never prescribed to them where they should go.

It will be asked in what way were these our promises made? It is difficult to reply to this question, as it involves the character of the Indian race.

An Indian's word when it is formally pledged, is one of the strongest moral securities on earth, like the rainbow it beams unbroken when all beneath is threatened with annihilation.

The most solemn form in which an Indian pledges his word, is by the delivery of a Wampum belt of Shells, and when the purport of this symbol is once declared, it is remembered and handed down from father to son, with an accuracy and retention of meaning which is quite extraordinary.

Whenever the belt is produced, every minute circumstance which attended its delivery seems instantly to be brought to life, and such is the singular effect produced on the Indian's mind by this talisman, that it is common for him, whom we term "the Savage" to shed tears at the sight of a Wampum which has accompanied a message from his friend.

I have mentioned these facts, because they will explain the confident reliance the Indians place on the promises which, accompanied by the delivery of Wampums, were made to them by our Generals, during and at the conclusion of the American Wars.

These rude ceremonies had probably little effect upon our officers, but they sunk [sic] deep in the minds of the Indians. The Wampums thus given, have been preserved and are now entrusted to the keeping of the great Orator, Liginish, who was present at the Council I attended on the Manitoulin Island in Lake Huron, and in every sense, these hieroglyphics are moral affidavits of the bygone transactions to which they relate. On our part, little or nothing documentary exists – the promises which were made, whatever they might have been, were almost invariably verbal, those who expressed them are now mouldering in their graves. However, the regular delivery of the presents, proves and corroborates the testimony of the Wampums, and by whatever sophistry we might deceive ourselves, we could never succeed in explaining to the Indians of the United States, that their Great Father was justified in deserting them.

To the third and fourth objections I have nothing to reply, for I must say I think the Americans have reason for the jealousy they express at the British Government interfering by positively arming their own Indians with whom they are at War, with English guns, powder and ball. I also cannot deny that a great proportion of the presents we give to the American Indians form a tribute which we annually pay to the Shopkeepers of the United States. . . .

. . . I am of opinion that to the visiting Indians of the United States we cannot without a breach of faith, directly refuse to continue the presents, which by the word of our generals we have promised, and which by long custom we have sanctioned. On observing that the minds of these people were wide open to reasonable conviction, it occurred to me that it would not be difficult to explain to them that their Great Father was still willing to continue presents to such of his red children as lived on his own Land, but that in justice to the Americans who are now our Allies, he could not arm against them those Indians who should continue to reside in the Territory of the United States, and consequently, that after the expiration of three years, presents would only be given to those of our red children who actually shall inhabit the Canadas.

I did not formally make this declaration at the Great Council at the Manitoulin Island, but it was sufficiently hinted to them to be clearly understood, and as far as I could learn and, have since learned, it was received without disapprobation.

I would therefore recommend that this declaration should be formally announced at the next delivery of presents. The Indians of the United States would then have plenty of time to prepare for the change, which I feel quite confident would end by our being released honorably and altogether from an engagement which I certainly think we have maintained long enough to reward liberally the United States Indians for the Services they rendered us during the War. . . .

> I do not think the Indians of the United States could or would complain of the above arrangement, and I feel certain that tho' a few would at first probably emigrate to Canada, they would not long remain there.
>
> For many reasons which it would be tedious to your Lordship that I should detail, I would recommend that the presents to the visiting Indians should for the three years be delivered at the Manitoulin Island only.
>
> The expense of forwarding the presents to that spot, tho' less than to the old place of delivery (Drummond Island) is greater than to Penetanguishene and Amherstburg, but as only those who are really in want of their presents would come to Manitoulin Island, we should gain, as indeed we did gain this year, by that arrangement infinitely more than the difference in the expense of transport. . . .
>
> Having disposed of at least one third of the Indian presents, and the expense of their delivery, I certainly respectfully recommend that we should continue to deliver them to those few Indians who continue to inhabit Upper Canada.
>
> I have already stated that the expense will shortly be defrayed altogether by the sale of the lands they have this year liberally surrendered to me; and even if that were not to be the case, I do think, that enjoying as we do possession of this noble Province, it is our bounden duty to consider as [illegible] the wreck of that simple-minded, illfated race, which (as I have already stated) is daily and yearly fading upon the progress of civilization.
>
> To have only to bear patiently with them for a short time, and with a few exceptions, principally half castes, their unhappy race beyond our power of redemption will be extinct.
>
> I am not prepared to recommend that money should be substituted for presents to the resident Indians in this province. –
>
> 1st. Because I think unless good arrangements were previously made, the Indians from their improvident habits, would in many places be left destitute, and
>
> 2ndly Because without due precaution, a money delivery to so many men, women and children, might possibly be attended with very great imposition.
>
> Another year's experience and reflection will I make no doubt, enable me to offer to your Lordship a decided opinion on this subject, as I am quite alive to the advantage which we should gain by the substitution of money, if it could be properly effected. . . .
>
> I am decidedly of opinion that at the expiration of three years, a still further reduction may be made in the Indian Department and that its expenses of every description will ere long be completely defrayed by the Lands which I have lately obtained from the Indians.[112]

Although Manitoulin Island never became the refuge Head envisioned, the related proposal to reduce and eliminate presents to "visiting Indians" from the United States was carried out, albeit on a different time frame. Head believed the government should continue to deliver presents to "those few Indians who continue to inhabit Upper Canada"; however, it is important to emphasize that he also believed their numbers were "yearly fading."

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[112] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 1-21).

In 1836, Head had "sufficiently hinted to [the Indians] to be clearly understood" that presents were to be discontinued. As early as June 1837, before the formal announcement of the impending discontinuation of presents, the Indian Superintendent at Sarnia, William Jones, reported that the news had "unsettled" the Indians.[113] Some were already making preparations to relocate to Canadian territory, although the Superintendent could not ascertain in what numbers.[114]

Events in the United States pushed more Indians into Canadian territory than Head had anticipated. Moreover, unforeseen circumstances meant that "visiting Indians" continued to receive presents until 1843. That extension, in theory at least, gave them six or seven years, rather than the intended two or three years, to make their decision.

Beyond the 1836 surrenders or treaties with the Ottawa, Chippewa, and Saugeen Indians that made Manitoulin Island and the Bruce Peninsula available, no formal land base was expressly established for any of the Indian allies who left the United States between 1836 and 1843. Relatively few of the immigrant Indians took up permanent settlement on Manitoulin Island. By 1862, Manitoulin Island was no longer exclusively reserved for Indians.[115]

Chief Superintendent Jarvis's Address, 1837

Head was unable to attend the August 1837 distribution of presents on Manitoulin Island owing to the death of King William IV in June of that year. The new Chief Superintendent of Indian Affairs, Samuel Peters Jarvis, therefore delivered the formal address explaining the government's decision to discontinue presents to Indians living in the United States. This he did on August 4, 1837, to a council of 75 principal Chiefs at Manitowaning on Manitoulin Island.[116] By then, "push had come to shove" across the border; the American government had decided to pay future annuities only to those Pottawatomi living in the United States west of the Mississippi River.[117]

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[113] William Jones, Indian Superintendent, Sarnia, to Colonel James Givins, Chief Superintendent, June 6, 1837, NA, RG 10, vol. 66, pp. 63507-09, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 2).

[114] William Jones, Indian Superintendent, Sarnia, to Colonel James Givins, Chief Superintendent, June 6, 1837, NA, RG 10, vol. 66, pp. 63507-09, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 2).

[115] Surtees, *Treaty Research Report: The Manitoulin Treaties*, 39.

After the distribution of presents to the 3700 Ottawa, Chippewa, Pottawatomi, Winnebago, and Menominee assembled at Manitowaning, Jarvis spoke.[118] It is not known which of the 75 principal Chiefs who heard Jarvis's speech may have been directly related to the present-day Moose Deer Point First Nation, since the names of only a few were recorded. Certainly, the Pottawatomi were represented. Eyewitness Anna Jameson identified at least one in her subsequent account, "a famous Pottowottomi chief and conjuror, called the Two Ears."[119] Also present were Chiefs Aisance and Yellowhead from Anderson's Coldwater civilization project.[120]

Jarvis explained, through the Ottawa interpreter Assiginack (Assikenack),[121] that in three years presents would be given only to Indians living in the British Empire, and not to those resident in the United States. Indians living in the United States who wanted to continue receiving presents were invited to "come and live under the protection of your Great Father."[122] They were told he was "willing that his Red Children should all become permanent Settlers in this [Manitoulin] island."[123]

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[116] Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 154-5); and Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 314.

[117] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 32).

[118] Anna Brownell Jameson, *Winter Studies and Summer Rambles in Canada* (Toronto: McClelland & Stewart, 1990), 497, 499-501 [hereafter Jameson, *Winter Studies and Summer Rambles*] (ICC Exhibit 20).

[119] Jameson, *Winter Studies and Summer Rambles*, 500 (ICC Exhibit 20).

[120] Jameson, *Winter Studies and Summer Rambles*, 500 (ICC Exhibit 20).

[121] Jameson, *Winter Studies and Summer Rambles*, 499-502 (ICC Exhibit 20).

[122] Jameson, *Winter Studies and Summer Rambles*, 504 (ICC Exhibit 20); see also NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50.

[123] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the

In anticipation of these announcements, Anderson and his staff had started building the necessary agency buildings and houses at Manitowaning on Manitoulin Island in the spring of 1837.[124]

As recorded, Jarvis's words were as follows:

> Children,
>
> When your Great Father the Lieutenant Governor parted with his Red Children at this place he promised again to meet them here at the Council Fire, and witness in Person the grand Delivery of Presents now just finished.
>
> To fulfil this engagement your Great Father the Lieutenant Governor left his Residence at Toronto and proceeded on his Way to the Great Manitoulin Island as far as Lake Simcoe. At this place a messenger who had been despatched from Toronto overtook him, and informed him of the death of your Great Father on the other Sidc of the Great Salt Lake, *and the accession of the Queen Victoria*. It consequently became necessary for your Great Father the Lieutenant Governor to return to the seat of his Government, and hold a Council with his chief Men.
>
> Children, – Your Great Father the Lieutenant Governor has deputed me to express to you his Regret and Disappointment at being thus unexpectedly deprived of the Pleasure which he had promised to himself in again seeing all his Red Children, and in taking by the Hand the Chiefs and Warriors of the numerous Tribes now here assembled.
>
> Children, – I am now to communicate to you a Matter in which many of you are deeply interested. Listen with Attention, and bear well in Mind what I say to you.
>
> Children, – Your Great Father the King has determined that Presents shall be continued to be given to all Indians resident in the Canadas; but Presents will be given to Indians residing in the United States only for Three Years, including the present Delivery.
>
> Children, the Reasons why Presents will not be continued to the Indians residing in the United States I will explain to you.
>
> 1st. All our Countrymen who resided in the United States forfeited their Claim for Protection from the British Government from the Moment their Great Father the King lost Possession of that Country; consequently the Indians have no Right to expect that their Great Father will continue to them what he does not continue to his own White Children.

Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, p. 156); see also Jameson, *Winter Studies and Summer Rambles*, 503 (ICC Exhibit 20); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50.

[124] Mrs S. Rowe, "Anderson Record from 1699 to 1896" (1905) VI Ontario Historical Society, *Papers and Records*, 131.

2d. The Indians of the United States who served in the late War have already received from the British Government more than has been received by the Soldiers of their Great Father who fought for him for Twenty Years.

3d. Among the Rules which civilized Nations are bound to attend to there is one which forbids your Great Father to give Arms and Ammunition to Indians of the United States who are fighting against the Government under which they live.

4th. The People of England have, through their Representatives in the Great Council of the Nation, uttered great Complaints at the Expense attendant upon a Continuation of the Expenditure of as large a Sum of Money for Indian Presents.

But, Children, let it be distinctly understood, that the British Government has not come to a Determination to cease to give Presents to the Indians of the United States. On the contrary, the Government of your Great Father will be most happy to do so, provided they live in the British Empire.

Therefore, although your Great Father is willing that his Red Children should all become permanent Settlers in this Island, it matters not in what Part of the British Empire they reside. They may go across the Great Salt Lake to the Country of their Great Father the King, and there reside and there receive their Presents, or they may remove into any part of the Provinces of Upper and Lower Canada, New Brunswick, Nova Scotia, or any other British Colony, and yet receive them; but they cannot and must not expect to receive them after the End of Three Years if they continue to reside within the Limits of the United States.

Children! – The Long Knives [Americans] have complained (and with justice too) that your Great Father, whilst he is at peace with them, has supplied his Red Children residing in their country, with whom the Long Knives are at war, with guns and powder and ball.

Children! – This, I repeat to you, is against the rules of civilised nations, and, if continued, will bring on war between your Great Father and the Long Knives.

Children! – You must therefore come and live under the protection of your Great Father, or lose the advantage which you have so long enjoyed, of annually receiving valuable presents from him.

Children, – I have one thing more to observe to you. There are many Clergymen constantly visiting you for the avowed Purpose of instructing you in Religious Principles. Listen to them with Attention when they talk to you on that Subject; but at the same Time keep always in view, and bear it well in your Minds, that they have nothing to do with your temporal Affairs.

Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. He has relinquished his Claim to this large and beautiful Island on which we are assembled, in order that you may have a Home of your own quite separate from his White Children. The Soil is good, and the Waters which surround the Shores of this Island are abundantly supplied with the finest of Fish.

If you cultivate the Soil with only moderate Industry, and exert yourselves to obtain Fish, you can never want, and your Great Father will continue to bestow annually on all those who permanently reside here or in any Part of his Dominions

> valuable Presents, and will from Time to Time visit you at this Place to behold your Improvements.
>
> Children, – Your Great Father the Lieutenant Governor, as a token of the above Declaration, transmits to the Indians a Silk British Flag, which represents the British Empire. Within this Flag, and immediately under the Symbol of the British Crown, are delineated a British Lion and a Beaver; by which is designated that the British People and the Indians, the former being represented by the Lion and the latter by the Beaver, are and will be alike regarded by their Sovereign so long as their Figures are represented on the British Flag, or in other Words, so long as they continue to inhabit the British Empire.
>
> Children, – This Flag is now yours; but it is necessary that some One Tribe should take charge of it, in order that it may be exhibited in this Island on all occasions when your Great Father either visits or bestows Presents on his Red Children. Choose, therefore, from among you, the Tribe to which you are willing to entrust it for safe Keeping, and remember to have it with you when we next meet again at this place.
>
> Children, – I bid you farewell; but before we part, let me express to you the high Satisfaction I feel at witnessing the quiet, sober, and orderly conduct which has prevailed in the Camp since my Arrival. There are assembled here upwards of 3,000 Persons, composed of different tribes; I have not seen or heard of any wrangling or quarrelling among you; I have not seen even One Man, Woman, or Child labouring under a State of Intoxication.
>
> Children, – Let me entreat you to abstain from indulging in the Use of Firewater. Let me entreat you to return immediately to your respective Homes, with the Presents now in your possession. Let me warn you against Attempts that may be made by Traders or other Persons to induce you to part with your Presents in exchange for Articles of little Value.
>
> Farewell.[125]

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[125] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles*, 502-05 (ICC Exhibit 20); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added; the three italicized paragraphs were omitted from the second manuscript version (pp. 63751-57) and the version in the *British Parliamentary Papers*, but were included in the Jameson version (reproduced here) and the first manuscript version (pp. 63741-50).

Jarvis did not disclose the long-range intention "to dispense with such distributions in future," as alluded to by Head.[126] Rather, Jarvis emphasized the aspect of British protection: "Your Great Father who lives across the Great Salt Lake is your guardian and protector, and he only." Irrespective of what was being contemplated at the higher levels of officialdom, Jarvis left the impression that presents would be bestowed "annually" to any Indian allies in the United States who took up the invitation to relocate to the Canadas or other points in the British Empire within the prescribed time limit. He simply suggested they support themselves through agriculture and fishing.[127]

Given that the "present Delivery" made in 1837 was to count as one of the three years, then the government's original intention was that 1838 and 1839 would be the last two years that "visiting Indians" would receive presents. Even though the government was offering Manitoulin Island as a place for these potential immigrants to settle, they were not obliged to live there, as residence within the British Empire represented the only precondition to their continued receipt of annual presents.

This turn of events presented a dilemma for the "visiting Indians." Moving to Canada would deprive them of their share of the annuities for the lands they had ceded to the American government, annuities now available only west of the Mississippi River.[128] Staying in the United States would mean having to leave the Great Lakes area as well as giving up presents from the British.[129] Faced with this choice, hundreds decided to move to Upper Canada shortly after Jarvis's announcement.

Some 432 Pottawatomi living in the United States collected presents on Manitoulin Island in 1837, but none did so in 1838. In 1838, the 505 Pottawatomi who collected presents on Manitoulin –

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[126] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 1-21). The specific quotation is set forth at p. 9.

[127] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, p. 156).

[128] Pottawatomi in the United States participated in more than 50 treaties with the American government between 1800 and 1867. Clifton, "Potawatomi," in *Handbook of North American Indians,* vol. 15, 736 (ICC Exhibit 12).

[129] This statement, attributed to Superintendent T.G. Anderson in a letter written on December 20, 1839, is referred to in a memorandum entitled "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 350-51). There is no indication on the face of the 1943 document of its author or its intended recipient.

406 from the Saugeen and the 99 from Penetanguishene – were counted as "resident Indians."[130] Overall, the number of "visiting Indians" who received annual presents at Manitoulin and Coldwater dropped from approximately 1800 in 1837 to fewer than 1000 in each of 1838 and 1839.

Difficulties with Head's Proposals

The delivery of presents to "visiting Indians" did not end in three years as Head had recommended in 1836. Moreover, Head's radical proposal to remove virtually all Indians to Manitoulin Island was not well received in any quarter. It enraged the local Methodist missionaries. It was opposed by the Aborigines Protection Society in England and the Executive Council of Lower Canada. Some Indians wanted to move to Manitoulin for their own reasons, but others were steadfastly opposed. Chippewa and Ottawa chiefs visiting Amherstburg from Indiana protested: "We have long ago given up attempting to cross the great waters in these frail bark canoes."[131]

No immediate action was taken on either of the contentious policy changes suggested by Head. Both risked disrupting the tried and true practice of Indian conciliation. Rebellions in Upper and Lower Canada in late 1837 and border raids by American Hunters' Lodges in the late 1830s were a greater concern. For the government, they produced an atmosphere of fear and uncertainty that precluded any action that would alienate Indian allies.[132] For some Indian allies the threats in late 1837 and through 1838 provided an opportunity to demonstrate their loyalty to the Crown.

In December 1837, 50 Pottawatomi and 40 Ojibwa from Lakes Huron and Simcoe volunteered to defend the Crown against rebels who were gathering north of Toronto. "Paroles" – reminders of earlier promises to return to the defence of the British Crown and not to take up arms against the British – were sent to the western Indians about the possible necessity of "unburying the hatchet." Although U.S. Indians who felt they had little to gain were less enthusiastic about these paroles than were those on Manitoulin Island,[133] there is evidence that Indian volunteers – perhaps including Ogemawahj, the Pottawatomi ancestor of the Moose Deer Point First Nation – were paid for their military service in 1839.[134]

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[130] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 334-35.

[131] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 20-21). By 1836, south of the Great Lakes, many preferred to travel by horse rather than canoe. "Visiting Indians" bound for Amherstburg via the Old Sauk Trail from Chicago were being ferried across the Detroit River to Amherstburg with their horses.

[132] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984. The 1837 Rebellion in Upper Canada had challenged the Tory Family Compact, with which many Indian Affairs officials were associated. The Hunters' Lodges were secret societies devoted to liberating the Canadas from Britain.

When Sir George Arthur replaced Head in March 1838, Jarvis sought instructions from the new Lieutenant Governor before distributing presents at Manitoulin in August that year. Jarvis explained to Arthur:

> I was instructed by Sir Francis Head, in August 1837, to apprise . . . the visiting Indians, residing in the United States Territory, that it was not the intention of Government to bestow presents on them, after the year 1838, unless they became permanent residents within the limits of Upper Canada or some portion of Her Majesty's dominion.[135]

Evidently Jarvis was not directed to repeat the announcement. He made no mention of it at the 1838 distribution. Instead, he acknowledged the government's problems, praised the loyalty of resident Pottawatomi and Ojibwa who had volunteered to suppress the 1837 uprisings, and promised that the Great Mother would never forget the conduct of her Indian warriors.[136]

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[133] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 327-30 and fn 93, p. 340.

[134] January 15, 1839, Paylist of £559.44.4 Army Sterling to three Officers (for 67 days) and 48 Chiefs and Warriors (for 61 days) being "Chippewa of Lakes Huron and Simcoe" assembled at Holland Landing from November 1838 to January 1839 and "employed, on Her Majesty's Service" "under the authority of His Excellency the Lieutenant Governor dated November 10, 1838," NA, RG 10, vol. 70, pp.65312-15 (ICC Exhibit 23). The list includes a Pottawatomi shown as "Okemauwatch" and three others with similar names.

[135] S.P. Jarvis, Chief Superintendent of Indian Affairs, to John MacAulay, July 21, 1838, NA, RG 10, C-11023, vol. 68, pp. 64646-47, cited in"Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 3). It is apparent that 1838 would have been the third year only if 1836 was counted as the first year. Otherwise, if counting from 1837, the third and last year of giving presents to "visiting Indians" would have been 1839. This error was corrected in Jarvis's August 25, 1838, letter to Macaulay, in which Jarvis stated that, "at the expiration of Three Years, including the Year 1839, Presents would be discontinued to Indians residing in the United States unless they removed within some part of the dominion of Her Britannic Majesty."

[136] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 338.

Jarvis had some misgivings of his own about discontinuing the presents:

> I was directed to communicate to the Visiting Indians residing within the Territory of the United States in 1837 by order of Sir Francis Head . . . that at the expiration of Three Years, including the Year 1839, Presents would be discontinued to Indians residing in the United States unless they removed to some part of the dominion of Her Britannic Majesty. The policy of this step, has always appeared to me very questionable and the justness of it still more so.
>
> The Indians generally residing within the American Territory consider themselves the allies of Great Britain and many of them as owing allegiance to the Crown. This was eminently manifested during the American War in 1812 & 13.
>
> The hostile feeling entertained by every Tribe residing in the United States toward the Government of that Country renders it in my opinion extremely impolitic just at this crisis, to deprive them of a Boon which they have enjoyed from the British Government, I believe since the peace of 1783.
>
> But a stronger argument in favour of continuing Presents to them is the circumstance, that British Faith has been pledged to that effect.[137]

Presents were given to "visiting Indians" for a few more years, but the Indian Department did not develop any new strategies in that time.

In the summer of 1838, Colonial Secretary Lord Glenelg directed Lieutenant Governor Arthur to revert to the civilization plan initiated in 1830. "Wandering Indians" were to settle and become farmers, missionaries were to be encouraged to educate them, and reserve lands were to be protected.[138] The "civilization" program was less than vigorous, however, because Indian superintendents were overworked and lacked staff.[139]

Once Head was out of office, the plan to remove Indians to Manitoulin Island lost momentum, even though the Assistant Indian Superintendent at Sarnia, J.W. Keating, worked hard to overcome the Indians' resistance to moving there. Dealing with an influx of Indians from the United States in the spring of 1839, Keating wrote to Jarvis:

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[137] S.P. Jarvis, Chief Superintendent, to John MacAulay, August 25, 1838, NA, RG 10, C-11023, vol. 69, pp. 64708-09, 64714-16, and 64727-29, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 4); cited in Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 339-40, as Jarvis to Macaulay, August 25, 1838, NA, RG 10, vol. 502, p. 126.

[138] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, pp. 48-49.

[139] John Leslie, "The Bagot Commission: Developing a Corporate Memory for the Indian Department," unpublished paper for Canadian Historical Association annual meeting, June 1982, p. 9.

> I am sorry to say that the Americans & I dare say some others have been tempering [sic] with the Indians & produced in some a disinclination to go; by informing them that they could get no leather for mocassins & that the inhabitants of [Manitoulin] Island were in a state of starvation. This I of course fully contradicted, & gave them an account of the Island such as I had seen it, & of the splendid fall fisheries in the immediate neighbourhood of Manitowaning . . . .
>
> After a considerable degree of hesitation & upon our positive assurance, that they could neither recur [sic] land to settle on here, or encouragement or assistance of any description from government unless they proceeded to Manitowaning they have decided to go.[140]

Simultaneously, the Indians were making arrangements to settle elsewhere. Keating's superior at Sarnia, William Jones, informed Jarvis in November 1839 that a band of Pottawatomi had "held a Council with the Chiefs on Walpole Island, from whom they received a Tract of land on the Chenail Ecart, to which they have repaired." It appeared to Jones that others were intending to go there as well.[141]

With respect to questions from the Lieutenant Governor and Colonial Secretary regarding the Indians' attitudes towards government policy, Jarvis referred these queries to Indian Superintendent Anderson at Manitoulin Island. Anderson replied that both "the Indians resident on the Island as well as the visitors" were "much pleased" by the formation of the establishment at Manitowaning, but were "slow" to take advantage of it owing to fears, encouraged by the Americans, that they might be dispossessed of these lands in the future. He added that, while the "visiting Indians" considered it a "very great hardship" to have presents discontinued unless they became resident in Canada, many did

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[140] J.W. Keating, Assistant Indian Superintendent, Sarnia, to Colonel S.P. Jarvis, Chief Superintendent, June 29, 1839, NA, RG 10, C-11024, vol. 70, pp. 65851-54, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 6).

[141] William Jones, Indian Superintendent, Sarnia, to Colonel S.P. Jarvis, Chief Superintendent, November 12, 1839, NA, RG 10, C-11025, vol. 71, pp. 66422-24, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 8).

"prefer losing their [U.S.] Land payments for the Known Certainty of receiving Presents [in Canadian territory]."[142]

Indians from the United States congregated on the Canadian side of the St Clair River, which connects Walpole Island in Lake St Clair with the southern tip of Lake Huron at Sarnia. When the Indians refused to go to Manitoulin Island, Jarvis directed that they be persuaded by telling them that no agricultural assistance would be given to them elsewhere:

> I am extremely sorry to learn that they shew a reluctance to proceed to Manitoulin. They must not expect to be assisted by Government unless they do go there. [T]hat . . . Establishment has been formed at very great expense and upon an extensive scale for the relief and accommodation of such Indians as may not have fixed residences and who are desirous of being civilized and assimilating their habits to those of white men. . . .
>
> I wish therefore that you would distinctly give them to understand that at this Station [Manitoulin] alone will they be assisted by the Government in the cultivation of the soil, and that it is the earnest wish of the Government that they should take up their residence at that place under Captain Anderson.[143]

At Sarnia, the frustrated Keating did not feel obliged to provide for Indians who had moved there. In June 1840, he intimated to Jarvis that he thought they could be manipulated by harsh treatment:

> [I]t will only be when they find themselves naked & hungry which they will in a year or so that they will succumb. That will I think be the best way of proceeding. [L]et . . . them suffer, & want presents & they will become tractable and plastic enough.[144]

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[142] Thomas G. Anderson, Indian Superintendent, Manitoulin Island, to S.B. Harrison, Secretary, Indian Department, July 18 or August 20, 1839, NA, RG 10, C-11025, vol. 71, pp. 66078 and 66087, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 7).

[143] S.P. Jarvis, Chief Superintendent, to unknown ["probably either J.W. Keating, Walpole Island, or Wm. Jones, St. Clair"], May 9, 1840, NA, RG 10, C-11026, vol. 73, pp. 67704-06, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, pp. 9-10).

[144] J.W. Keating, Indian Superintendent, Sutherlands, to S.P. Jarvis, Chief Superintendent, June 22, 1840, NA, RG 10, vol. 73, pp. 67819-20, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 11).

Keating expected that, by the spring of 1841, he would be able to transport Pottawatomi from Walpole Island to Manitoulin Island by boat, with the expense paid by the sale of their horses.[145]

The decade of the 1840s marked a new era in Canadian politics. In October 1840, soon after the *Union Act* laid the groundwork for the union of Upper and Lower Canada, the Lieutenant Governor informed Jarvis that he did not want any means being used to "induce or encourage Indians to come into the Country."[146] By February 1841, Upper Canada ceased to be a separate entity and was subsumed under the United Province of Canada.[147] In March 1841, Civil Secretary T.W. Murdoch informed Jarvis that Indians from the United States would have to relocate to British North America before the 1843 present distribution if they wished to continue receiving them.[148] Murdoch not only reinstituted a deadline for giving presents to "visiting Indians" but probably hoped to stem Indian immigration from the United States at the same time.

Jarvis was still not in favour of ending the practice. He pointed out that the guarantee of "Her Majesty's bounty" went back to William and John Johnson, "and especially" to Sir George Prevost's March 17, 1814, council of western Chiefs whose possessions were "within the Royal Standard at the declaration of the War of 1812." Jarvis knew these Indian allies had been promised that the King would not forget them in peace.[149] Given the willingness of the Indians to oppose the rebels during 1837 and 1838, Jarvis also believed that resident Indians, as well as "visiting Indians" from the United

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[145] J.W. Keating, Indian Superintendent, Sutherlands, to S.P. Jarvis, Chief Superintendent, July 4, 1840, NA, RG 10, C-11026, vol. 74, pp. 67908-11, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 12). The evidence before the Commission does not disclose whether this transfer actually occurred in 1841.

[146] S.B. Harrison, Secretary, Indian Department, to S.P. Jarvis, Chief Superintendent, October 2, 1840, NA, RG 10, C-11026, vol. 75, pp. 68287-88, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 12).

[147] Frederick H. Armstrong, *Handbook of Upper Canadian Chronology* (Toronto: Dundurn Press, 1985), 36.

[148] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, p. 393.

[149] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 393-95.

States, remained committed to the defence of the Crown, and that their services entitled them to presents.[150]

However, the greater peace that prevailed after Union in 1841 made the discontinuance of presents more feasible for the British. His own concerns notwithstanding, Jarvis directed Anderson and the other superintendents in December 1841 to inform as many Indians as possible that non-residents would get no presents after 1843. Jarvis expected the Indians to spread the word to their friends and relatives in the United States. By the end of December, Jarvis reported that this news had been communicated to all the Indian tribes resident in western Canada. By January 1842, Jarvis was prepared to agree that the time had arrived "when in justice to the Government as well as to the Indian the line of distinction should be drawn and made known as to what Indians are or are not in future to share Her Majesty's Bounty."[151]

In 1842, the Bagot Commission began its investigation of the Indian Department. Concerned with the efficiency and cost effectiveness of the civilization program, the Bagot Commissioners suggested a plan to limit presents immediately. The plan involved taking a census of all resident Indians to ensure that only those on official band lists would receive presents. The Governor General would be required to authorize any additions to the lists. "Halfbreeds" and their descendants would not be included unless they were adopted by the tribe with which they lived, and Indian women living with or married to white men would be excluded. Wherever feasible, the nature of the presents would be in keeping with agricultural pursuits.[152]

No such census was taken. "Visiting Indians" continued to receive presents, although on a smaller scale, through to 1843. The distribution of ammunition was reduced in favour of distributing more "practical" presents.[153]

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[150] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 393-95.

[151] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 395-96.

[152] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, pp. 90-92.

[153] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, p. 104.

When "visiting Indians" received presents for the last time on Manitoulin Island in 1843, there was no public speech. Jarvis did not attend, nor was there a general distribution of presents. Instead, the effective head of the Bagot Commission, R.W. Rawson, and the new Governor General, Charles T. Metcalfe (appointed in 1843), directed Superintendent Anderson to inform groups of "visiting Indians" individually that they would no longer be receiving presents. Adopting the civilized life was to be recommended as the only means by which the Indians might continue to provide for their families. Nevertheless, the Indians were to be reassured that the government would "ever feel a lively interest in their welfare and the advancement of all the Indian tribes on the continent." Rawson ordered Anderson to give visiting chiefs a tour of Manitowaning to demonstrate the "beneficial change which had taken place in the condition of their brethren." By then there were approximately 1100 Indian residents at Manitowaning.[154]

Government officials consistently concealed the government's desire to do away with all presents. A decade after the elimination of presents to "visiting Indians," around 1853 or 1854, presents to resident Indians began decreasing. There had been no warning of this reduction in Head's address of 1836, in Jarvis's announcement in 1837, or in the Superintendents' "announcements" of 1841 and 1843.

In 1844, the Bagot Commission report suggested terminating annual presents to all resident Indians. At least one historian suggests this was not done during the 1840s "owing to Indian opposition and increased international tensions involving the dispute over the Oregon boundary."[155] In July 1850, Colonial Secretary Earl Grey wrote to the Governor General, Lord Elgin, to warn him that the House of Commons intended to discontinue any funding related to annual presents. In a report prepared to determine the least objectionable way to end the presents, Lord Elgin proposed that they first be curtailed to the more "advanced" or "civilized" tribes, with those still dependent on hunting and fishing to be given more time to prepare for their termination. The Colonial Secretary's

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[154] Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815-1843," PhD thesis, University of Western Ontario, 1992, pp. 400-02.

[155] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, p. 104.

March 1851 response to this report was that presents had to be progressively reduced from 1852 until complete abolition in 1858.[156]

Ottawa Chief Assiginack, who had been the interpreter for Head's 1836 address, learned of the impending discontinuation of presents to resident Indians around 1851. In protesting the proposal, Assiginack recounted the history of the 1837 council and concluded that presents could not end unless the bright sun of the British Empire fell into moral decay.[157]

In 1852, Ogemawahj (specifically referred to as "a Potawatomie"), Chief Aisance (formerly of Coldwater), and about a dozen other Chiefs were informed by Anderson that presents to resident Indians would soon be ending. Anderson held meetings at Penetanguishene and several other locations to convey the news. In these speeches, he characterized the giving of presents as a form of charity and avoided making any connection between presents and military service in the British interest:

> My Brethern [sic],
> When I last met you in Council I told you the period was near at hand when you would get no more Presents. I did not know at that time that the day was so near, but the time has arrived and this is the last day (year) that Your Great Mother's Blankets will be issued to you.
>
> My B[rethern],
> I hold in my hand a letter which contains the information on the subject (The Hon^{ble} the Superintendent General's letter dated "Quebec 8 July 1852") which I am commanded to communicate to you and which I shall endeavor to make you understand, if however there should be any part of it that you do not comprehend, ask me about it and I will tell you.
>
> My B[rethern],
> This letter informs you that your Great Mother's Councillors had considered the subject of the Indian Presents; that after many days (years) serious thought about the matter they have concluded that this shall be the last time this bounty shall be distributed to the settled Indians in Upper Canada.

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[156] John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University, 1984, pp. 130-32.

[157] James A. Clifton, "Visiting Indians in Canada," manuscript for a Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 40-41).

My B[rethern],
Presents were first given to the Indians when they were poor and could not support themselves – the Government saw their situation – took pity on them – were charitable to them and kindly gave them Clothing. But now that many of you have become Farmers, have annuities, plenty of Land, pay no Taxes and are well able to work, your Great Mother's wise men consider it unjust that the white men living beyond the Great Salt Lake should any longer pay money to buy Goods for the Indians who are so much better provided for than many of your Great Mother's white children.

My B[rethern],
You know that all Game is fled from your grasp. You cannot live by the Chase. You must therefore go to work and cultivate the soil like white men. With your industry, your annuities and the interest arising from the sale of land, if managed with care, you will have abundance of every thing and will not feel the want of the Presents. But if any of you frequent the Fire-Water shops and will not work, such, like white men who live in the same way, must expect to be poor and wretched in the world and forever miserable in the [illegible] to come.

My B[rethren],
Your Great Father is rejoiced to hear that many of your people are becoming good workers and would regret to learn that any, either from indolence, [illegible] or any other neglect of their duty, should allow their wives or children to suffer from the want of those comforts which industrious conduct could so easily provide for them.

My B[rethren],
I have told you that this is the last time you will receive Blankets from the Gov[ern]m[en]t and to show you with how much care it has considered your interest I now tell you that next year, three fourths of the value of the Presents will be paid in money, that is to say, the amount will be added to your annuities respectively and apply in the same way that your annuities are. The year after only one half will be allowed you, and the following, being the last year only one fourth, and thus will end what is called Indian Presents. The Government, my friends, have adopted this humane mode of putting an end, by degrees, to the gratuity which you and your fathers have received for nearly a hundred years merely out of charity because you were not able to clothe yourselves.

My B[rethren],
You must not suppose that because you are not to receive any more Presents that the Government casts you off and will take no more care of you, for I am strictly commanded to tell you that they will continue to take a deep interest in your welfare, will continue to be your advisers, to conduct the expenditure of your funds, and in fact do everything that is just and reasonable to promote your happiness and particularly as regards your advancement in the arts of civilized life.

My B[rethren],
For more than twenty years the Government have addressed you through me, exhorting you and advising you to adopt the customs of your white brethern [sic] around you to cultivate the soil and by other habits of manly labour to support your families in comfort, to live like good Christians and to get your children educated. Had you followed this good and friendly advice you would now have large farms producing abundant crops, and many of your young men and women would be respectable members of society. But instead of taking this good advice, you have listened to those people who wish to get your money for their Fire-Water, and to keep you hunting muskrats to make a profit by their trade, not caring to what state of wretchedness they may reduce you.

My B[rethren],
And now let me ask, what do you intend to do? You have good annuities it is true, but if you continue idle they are not sufficient to provide all your people with food and clothing. Throw off indolent habits, turn to the plough and work like men. Send your children to the Big School where they will be taught every thing that is good for them. Follow the advice of your Great Father and assemble yourselves together into large communities, where he will give you good Land where you may prepare farms to leave for your children when you leave this world. Do not continue to live in small bands, nor think of going to settle on Islands, for depend upon it, Your Great Father will not encourage your doing either. Go then at once to such place as he may direct so that your interest may be better attended to.

My B[rethren],
In old times when your ancestors were about to leave this world for the land of spirits, they could call their children about them and say, "My children, I am leaving you and am going to the land where by fathers are gone. Be not greived [sic], I leave you plenty to support you and your children. These are my Rivers and my hunting ground full of Game. There is my Bow and arrows, my canoe and my spear, all I have I leave to you, take good care of them, use them with diligence and you will have all you want for the comfort of your families."

My B[rethren],
You have no Rivers, no hunting grounds to leave to your children. What do you intend to do for them? You love your children as your ancestors loved theirs. What do you intend to leave for them to live upon when you are gone? If you do not wish them to prowl about like wolves and foxes for food, you must go to work and prepare farms for them, and in the meantime send them to the Big Schools to be educated.

> My B[rethren],
> Reflect seriously on what I have said and recollect, I again repeat it, that Your Great Father will not encourage your remaining in small bands, nor will he help you to settle on any Island unless it be the Great Manitoulin.[158]

Chief Aisance was the first to reply after Anderson spoke at Penetanguishene. He accepted discontinuation of the presents in principle, but thought it should be put off for another generation and a half:

> Father,
> I tell you the Government promised our forefathers that they would receive presents for three Generations. Only one generation has passed away and I am not yet in the prime of life and the Presents should continue to be given for one more generation and a half.
>
> Father,
> It is only four years since we began to send our Children to the Big School to be instructed and we think the Government ought to continue giving Presents until our Children are well instructed. . . .
>
> Father,
> The Indians are yet poor and there are many widows and orphans among us who are not able to clothe themselves and buy other things they cannot do without.[159]

Although bands receiving treaty annuities seemed quite prepared to accept the eventual discontinuation of presents to resident Indians, Ogemawahj was not. Speaking to Anderson at Penetanguishene, Ogemawahj pointed out that the circumstances of his people were different. Remembering the pledges of the British, he pleaded the disadvantaged status of his people:

> Father,
> We, Potawatomies are poor. We do not receive annuities, we don't know how we can provide clothing for our families when we get no more Presents. This we wish our Great Father to know.

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[158] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, pp. 163974-78 (ICC Exhibit 22).

[159] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, p. 163979 (ICC Exhibit 22).

> Father,
> We say again and we wish our Great Father to hear it, we have nothing to depend upon for a living, and hope he will continue to give us this bounty as he told our fathers he would do. He said he would continue to give us Presents as long as the sun should appear in the sky.[160]

Present-giving was wholly discontinued in or by 1858, two years after the 1856 transfer of Crown lands from imperial to Canadian control.[161] The action appears to have been taken largely without reference to pledges made in wartime or to inconsistencies in how various groups of Indians would be affected by the change.

Most of Manitoulin Island was opened to non-native settlement by surrender of the "Chiefs and Principal Men of the Ottawa, Chippewa and other Indians occupying the said Island" on October 6, 1862.[162] The surrender cited the 1836 surrender arranged by Head, but pointed out that "few Indians from the mainland, who it was intended to transfer to the island, have ever come to reside thereon."[163] For the government, the Manitowaning establishment had been a disappointing experiment:

> It was hoped that substantial numbers of Indians from the rest of the province, but particularly from Saugeen and the north shore [of] Lake Huron, would settle near Manitowaning in order to receive the assistance of the Department personnel. As they made progress, they would offer a concrete example to other bands who, it was felt, would want to emulate their success.[164]

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[160] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, p. 163980 (ICC Exhibit 22).

[161] Memorandum entitled "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 350-51); James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 40); Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90).

[162] James Clifton, "A Report on a Survey of Potawatomi Indian Groups in Canada," July 24, 1973 (ICC Exhibit 14, p. 6); Surtees, *Treaty Research Report: The Manitoulin Treaties*.

[163] Surtees, *Treaty Research Report: The Manitoulin Treaties* ,39.

[164] Surtees, *Treaty Research Report: The Manitoulin Treaties*, 16.

For various reasons, including the relative remoteness of Manitoulin Island and minimal agricultural success, the Indian population of the Island was just 1200 in 1858.[165] Some Indian residents had left the Island to join other bands. Agency buildings and the school at Manitowaning were in a "ruinous" state of disrepair, and the nearby farms were being neglected.[166]

MIGRATION TO CANADA AND THE AFTERMATH

Pottawatomi Immigration/Migration from 1837

During the 1830s and 1840s, some 5000 to 9000 "visiting Indians" eventually moved from American to Canadian territory. Most were Ojibwa, Ottawa, and Pottawatomi, but there were also smaller numbers of Shawnee, Winnebago, Sauk, and Menominee. The addition of so many Indians was more than the government had anticipated, even though the population of the province underwent a sixfold increase from 158,000 in 1825 to 952,000 in 1852.[167]

Anthropologist James Clifton's view is that American Indian policy was a great influence on the decision of Indians in the United States to move to Canada:

> The end of presents itself contributed to their immigration, as did the invitation to take up residence in Canada. However, the major force was the American Removal Policy which threatened to force the Great Lakes Indians west onto the dry prairie lands. Many of the tribes adjacent to the border then saw Canada as a refuge and some took advantage of the invitation to evade the full impact of American policy.[168]

After about 1840, or until they became settled, many immigrant Pottawatomi formerly known to the Indian Department as "western" or "visiting Indians" were reclassified as "wandering Indians," since they lacked reserves in Canada.[169] Competition for a shrinking land base forced some Pottawatomi to move frequently.[170] Many Pottawatomi married in, were adopted in, or simply moved in with Ojibwa (Chippewa) and Ottawa who had reserves and treaty rights. This merging occurred both before and after the creation of reserves resulting from various surrenders and treaties made mainly between 1815 and 1850.[171] These immigrants' descendants are now associated with most of the small reserves located along the east coast of Lake Huron from Lake St Clair to north of Manitoulin Island.[172]

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[165] Surtees, *Treaty Research Report: The Manitoulin Treaties*, 16.

[166] Surtees, *Treaty Research Report: The Manitoulin Treaties*, 18-19.

[167] R. Louis Gentilcore, ed., *Historical Atlas of Canada*, Volume II: *The Land Transformed, 1800-1891* (Toronto: University of Toronto Press, 1987), plate 10.

[168] James A. Clifton, "Visiting Indians in Canada," manuscript for a Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 43-44).

[169] Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 34-36).

Given that "visiting Indians" received presents until 1843, it is probably impossible to identify the precise moment when certain Moose Deer Point ancestors crossed over into Canadian territory with the intent of settling permanently, as opposed to simply collecting annual presents.[173] The First Nation's written submission concedes that there is "conflicting evidence" as to the dates of the migration of the Pottawatomi ancestors named Waucosh (Williams) and Winamek (Isaac). A Winamek fought with Tecumseh, and someone by this name died in a battle in the Detroit-Amherstburg area. Nor is it known when the ancestors of the Newganub (Sandy) family came although Newganub was the name of an Ottawa chief from a village near Chicago.[174] The source for saying that the "Aubey family came in 1837" is likewise unclear. However, it is submitted that their predecessors, the ancestors of the Moose Deer Point First Nation, lived with and perhaps were even members of the Coldwater, Parry Island, Beausoleil, and Christian Island Bands.[175] As will be seen below, in affidavits and applications for membership in the Beausoleil Band in 1912, some of the

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[170] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90). Clifton cites S.P.Jarvis to William Rawson, October 18, 1843, "RG 10, vol. 7, pp. 196-2a."

[171] Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 90-91).

[172] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 44).

[173] Memorandum entitled "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, p. 351); James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, pp. 40 and 43); Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 90-91).

[174] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, pp. 46-49, citing Dr Ian V.B. Johnson, "Moose Deer Point Claim," October 1993 (ICC Documents, pp 366-67 and 369-70).

[175] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, pp. 46-49.

Pottawatomi stated that they or their predecessors had received "annuities" from Anderson at Penetanguishene with the Beausoleil Band and that Ogemawahj was the first settler on Christian Island.[176]

Among the Chippewa of Saugeen who surrendered their territory on August 9, 1836, were some Pottawatomi.[177] Since no officer of the government had visited them between 1837 and the early 1840s, when the Bagot Commission undertook its investigations, Jarvis could not give an accurate account of their settlement except to say that the people receiving annuities were mostly Wesleyan Methodists.[178] Clifton's work mentions a village of about 370 Pottawatomi at the base of the Bruce Peninsula by 1838. They had gardens and they hunted and fished, but, in 1838, "depredations on the whites in the vicinity of Goderich" (to the south along the shore of Lake Huron) were attributed by Jarvis to "transient" Pottawatomi from that village.[179] In 1855, officials described the group at that location as "indolent and improvident."[180]

Anderson noted in August and November 1837 that 432 Pottawatomi from "Millwackie" (Milwaukee), some of whom were already clearing land on Manitoulin for the next year, were planning to remain in Canada, while 218 Pottawatomi were wintering at the Saugeen.[181] In 1842, presents were distributed to 319 Chippewa and 507 Pottawatomi, Ottawa, and American Indians at

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[176] 1912 Applications from 17 or more non-treaty Indians (ICC Documents, pp. 126-92).

[177] Sir Charles Bagot, "Report on the Affairs of Indians in Canada," March 20, 1845 (ICC Documents, p. 29).

[178] Sir Charles Bagot, "Report on the Affairs of Indians in Canada," March 20, 1845 (ICC Documents, p. 29).

[179] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90). Clifton cites "MacCauley's Report, 1839, [NA,] RG 10, vol. 718."

[180] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 90). Clifton cites "Report of the Special Commissioners to Investigate Indian Affairs in Canada, Sessional Papers, 1858."

[181] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 68); T.G. Anderson, Indian Superintendent, Manitowaning, "Return of Indians who Received Presents at Manatowauning in August, 1837," August 8, 1837, NA, RG 10, C-11023, vol. 68, p. 64440, in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 3); Upper Canada, "Estimate of Goods Required by the Indian Department as Presents to the Indians in the Annexed Numerical Statement for the Year 1839," November 10, 1837, NA, RG 10, C-11023, vol. 67, pp. 64097, 64101, 64103, and 64107 (ICC Exhibit 15, p. 3).

Walpole Island, a settlement established in 1782 for Chippewa loyalists.[182] Anderson reported a small band of Pottawatomi living near the Chippewa on Beausoleil Island in 1845.[183]

The lack of a land base for the Pottawatomi was clearly a problem from the beginning, but there was no official will to rectify the situation. Early reports simply deplored the Pottawatomi's wandering, begging, drinking, and fighting.[184] An 1844-45 government report commented that "their arrival in the Province is in every respect to be regretted."[185]

On June 14, 1844, the two Indian agents on the St Clair River, J.W. Keating and William Jones, were asked to explain to the new Chief Superintendent of Indian Affairs why so many Pottawatomi had been allowed to relocate to Canada. In their joint reply, they stated that the Pottawatomi had come "on the basis of [the] earlier solemn pledges made to them for their services to the King in a time of trial." Moreover, the Indians had come in response to the agents' invitation because the latter had been specifically instructed in 1841 to induce as many as possible to emigrate. Those who entered via Sarnia could not reach Manitoulin Island by water because they travelled by horse rather than by canoe. At Sarnia they had "only hospitality," but at Walpole Island they had refuge owing to land provided by Colonel Alexander McKee in "some complicated land transactions" in 1790.[186]

There were other reasons why they came. Some, not agreeing with their leadership in the United States and wanting to stay in the Great Lakes region, moved to Canada to escape forced assimilation, perhaps expecting that the British would be different from the Americans in that respect.[187] Devoted to their own traditional way of life and religious practices, they were exceptionally resistant to the teachings of missionaries. Most of the Pottawatomi immigrants did not convert to Christianity or take up agriculture en masse. Indeed, in 1854, there were complaints that they were subverting the work of missionaries.[188]

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[182] John Leslie, "The Bagot Commission: Developing a Corporate Memory for the Indian Department," unpublished paper for Canadian Historical Association annual meeting, June 1982, Summary Chart, p. 3.

[183] T.G. Anderson, Indian Superintendent, Manitowaning, "Chippewas of Lakes Huron & Simcoe residing at Beausoliel [sic] Island in Lake Huron, and including a Small Band of Potawatamies living near to it," 1845, NA, RG 10, vol. 268, pp. 163871 (ICC Documents, pp. 31-33).

[184] Superintendent Keating described recently arrived Pottawatomi refugees as "wild, dishonest, turbulent, ragged and filthy": John Leslie, "The Bagot Commission: Developing a Corporate Memory for the Indian Department," unpublished paper for Canadian Historical Association annual meeting, June 1982, Summary Chart, p. 3. See also Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 92). Clifton cites"[NA,] RG 10, vol. 2789."

[185] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 92). Clifton cites "Report on the Affairs of the Indians in Canada," Province of Canada, Legislative Assembly, Journals, 1844-45.

[186] Clifton, *A Place of Refuge* (ICC Exhibit 13, pp. 58-59, 73-74). Clifton cites William Jones and J.W. Keating, Indian Agents, to J.M. Higginson, Chief Superintendent, June 15, 1844, NA, RG 10, vol. 2789.

In 1858, at about the time the Beausoleil Band surrendered Beausoleil Island to move to Christian Island, the Indian Commissioner reported that there were about 49 Pottawatomi and 45 Ottawa ("in all 94") already living on Christian Island:

> The former [Pottawatomi] . . . remain heathen though every effort has been made to Christianize them. They have no money payments but the Beausoliel [sic] Indians have offered to receive them into their Band and share the annuity with them, if they will abandon their heathenish customs and embrace christianity.[189]

The Indian Commissioner did not make direct contact in 1858, however:

> The Pottawatomies and Ottawas living on Christian Island did not come to me at Penetanguishene, and I had no means of going to them to take the census, therefore I can only give the numbers as stated in last year's return, viz, - Pottawatamies: 14 men, 17 women, 18 children, making 49; Ottawas: 9 men, 10 women, 26 children, making 45. The former emigrated from Lake Michigan many years ago, and have ever since been considered as belonging to this country. The latter emigrated from the United States, I think in 1854.[190]

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[187] Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, p. 18).

[188] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 92). Clifton cites "Clark to Clench, March 16, [1854, NA], RG 10, vol. 438."

[189] Extracts from *Report of the Indian Commissioners, 1858,* Appendix 21, vol. 16, No. 6, Province of Canada, Sessional Papers, 1858, in a Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 194-91).

[190] Extracts from *Report of the Indian Commissioners, 1858,* Appendix 21, vol. 16, No. 6, Province of Canada, Sessional Papers, 1858, in a Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 194-95).

In 1877, some of the Pottawatomi who had lived on Christian Island for at least 20 years moved to Parry Island because of the cultural differences between them and the Beausoleil Chippewa (Ojibwa) who had moved in and wanted the Pottawatomi to become Christian. This exodus did not end the Pottawatomi presence on Christian Island, however. Other Pottawatomi moved there later but, as Clifton notes, "[w]here they came from is not clear."[191]

Moose Deer Point Settlement

The ambiguous status of the Pottawatomi in Canada is one of the reasons why they settled on islands, points, and peninsulas along the shore of Lake Huron which were beyond the immediate interest of Canadian developers.[192] Moose Deer Point is a prime example: it was one of the more isolated locations and happened to be abundantly endowed with the requisite resources for a traditional economy.

"Evidence concerning the date of settlement [at Moose Deer Point] varies."[193] The First Nation's position is that "[m]any at Moose Deer Point are descended from Ogemawahj (Ogemahwahjwon, Ogeemawatch, Ogimawadj), who fought in the War of 1812." The statement that "Ogemawahj himself migrated in 1835"[194] is based on the 1912 applications for membership in the Beausoleil/Christian Island Band submitted 77 years after Ogemawahj's ostensible arrival.[195] A mainly Pottawatomi settlement may have existed at Moose Deer Point before present-giving to "visiting Indians" finally ended in 1843. If not, it is certainly likely that it was there before presents to resident Indians ended in 1858 and before Manitoulin Island was opened to general settlement in 1862.

There does not appear to be any reason to dispute the statement that some Moose Deer Point people lived previously on Christian Island:

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[191] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 97).

[192] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 96).

[193] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 56.

[194] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 48.

[195] 1912 Applications from non-treaty Indians "to share in the annuity of the Indians known as the Beausoliel [sic] Band" (ICC Documents, pp. 144-92).

> A number of the Pottawatomi who had been living on Christian Island left the island and settled at Moose Deer Point. This may have occurred because of religious differences between the Christian Island Band, and the more traditional Pottawatomi, or because of leadership conflicts following the death of Ogamawahj.[196]

In other materials submitted by the First Nation, John King is identified as the son of Ogemawahj, who was from Wisconsin.[197] King is said to have moved to the Moose Deer Point location along with the Williams, Jones, Keesis, and Tabobondong families.[198]

Although the present inquiry of the Indian Claims Commission has not included a community session, the documentation provided by the First Nation includes some relevant statements by elders regarding the historical residency of the Pottawatomi. Art Sandy asserted that the Moose Deer Point people had been there for over 150 years (since before 1843), and that they constitute a mixture of Wisconsin Pottawatomi and Manitoulin Island Ottawa who intermarried with Ojibwa from Parry Island and other reserves in the vicinity.[199] Norman Williams stated:

> We have been here at Moose Deer Point since the 1830s. We were at Christian Island before that. My father's family came from Wisconsin originally but everyone here is related to people from Parry Island or other Reserves through marriage. My father could speak Pottawatomi but mostly he spoke Ojibway. Everyone here did when I was young.[200]

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[196] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 56.

[197] Cynthia C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background & Recommendations," March 1988 (ICC Exhibit 5, p. 3). See also Joan Holmes & Associates Inc., "Moose Deer Point I.R. No. 79 Report," October 1994 (ICC Exhibit 2, p. 18).

[198] Charles Skene, Visiting Superintendent, Parry Sound, to Indian Affairs, [no date given], NA, RG 10, vol. 2005, file 7752, Cynthia C. Wesley-Esquimaux, "Moose Deer Point: Robinson Huron Treaty Adhesion, Historical Background & Recommendations," March 1988 (ICC Exhibit 5, p. 9).

[199] Art Sandy, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, p. 96 (ICC Documents, p. 418).

[200] Norman Williams, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, p. 98 (ICC Documents, p. 420).

Williams also added that the Parry Island Ojibway First Nation (Wasuaksing) and the Beausoleil First Nation (Christian Island) had permitted his people to take up residence at Moose Deer Point.[201]

A 1917 report from the Indian Affairs' Survey Branch to the Deputy Superintendent of Indian Affairs stated that Chief John King moved to Moose Deer Point (King's Bay) from the United States "about seventy years ago" – that is, around 1847. Of the four brothers who came with him, two went to Parry Island and two went to Christian Island, with the result that the brothers' descendants were admitted into those two bands. This 1917 report, prepared when Indian Affairs was considering how to define the reserve at Moose Deer Point, described John King and his wife as "non-treaty."[202]

Robinson-Huron Treaty, 1850, and Williams Treaty, 1923

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Since the effort to centralize Indians on Manitoulin Island had failed, many Indians were still living along the northernmost shores of Lakes Huron and Superior when mining interests acquired licences in the area in the 1840s. The Robinson-Huron and the Robinson-Superior treaties were designed to deal with the Indians' protests and to open the region for mining. In preparation, Superintendent Anderson and Alexander Vidal, a land surveyor from Sarnia, toured the area, located the bands, and confirmed that they were entitled to compensation.

Many bands were absent when Anderson and Vidal travelled along the shores of the two lakes in the fall of 1849. The two met with groups of chiefs at Manitowaning on October 26, 1849, and Penetanguishene on November 3, 1849; however, neither Anderson nor Vidal recorded the names of the bands and Chiefs with whom they met.[203] The next year, in September 1850, William Benjamin Robinson negotiated the Robinson-Huron and Robinson-Superior treaties with the Ojibwa at Sault Ste Marie. By means of the Robinson-Huron Treaty, the Crown initially acquired the entire northern shoreline of Lake Huron from Lake Superior to Matchedash Bay, which lies south of Moose Deer Point and the Severn River near Coldwater.[204]

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[201] Norman Williams, Moose Deer Point First Nation, in Cynthia C. Wesley-Esquimaux and Dr I.V.B. Johnson, "United Anishnaabeg Elders: The Treaties Revisited," April 1996, p. 99 (ICC Documents, p. 421).

[202] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 296-97).

[203] Robert J. Surtees, *Treaty Research Report: The Robinson Treaties* (Ottawa: DIAND, 1986), 10-12.

The Robinson-Huron Teaty produced some 21 reserves which, for the most part, were selected by individual Chiefs at locations where their bands had either fishing stations or summer encampments.[205] Although Moose Deer Point is within the geographical area covered by the treaty, the people living there were not taken into account and consequently did not come into any reserve lands or annuities as a result of that treaty.[206]

The three Chippewa Chiefs – Yellowhead, Aisance, and Snake – who had been at Coldwater from 1830 to 1836 protested the Robinson-Huron Treaty just days after it was made. Over 70 years later, in 1923, these protests finally culminated in another treaty – the Williams Treaty – that also covered an area including Moose Deer Point. This treaty overlapped the Robinson-Huron Treaty area and covered the shoreline from the French River to Matchedash Bay.[207] Once again, the people living at Moose Deer Point were not involved when the treaty was made, although the Pottawatomi descendants of Ogemawahj who had joined the Christian Island (Beausoleil) Band membership were party to it.[208] However, the Williams Treaty is outside the scope of this inquiry.

Pottawatomi Approach Other Bands, 1877

In 1867, the Dominion of Canada assumed responsibility for "Indians and lands reserved for Indians." The federal government extended the procedures previously devised in Upper Canada/Canada West for managing Indian Affairs until it passed the first consolidated *Indian Act* in 1876. That year, William Plummer became the Visiting Superintendent and Commissioner based in Toronto, and Charles Skene became the Visiting Superintendent based in Parry Sound.

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[204] Robert J. Surtees, *Indian Land Surrenders in Ontario, 1763-1867* (Ottawa: DIAND, 1984), 97.

[205] Robert J. Surtees, *Indian Land Surrenders in Ontario, 1763-1867* (Ottawa: DIAND, 1984), 97.

[206] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 84.

[207] Robert J. Surtees, *Treaty Research Report: The Robinson Treaties* (Ottawa: DIAND, 1986), 28-29.

[208] Written Submission on Behalf of Moose Deer Point First Nation, August 1, 1997, p. 83.

Possibly as early as 1871, Pottawatomi living at Moose Deer Point, Christian Island, and Parry Island began their quest for treaty annuities in Canada.[209] This effort took various forms over the years. Some individuals gained full membership in the bands at the latter two locations through intermarriage or by specific approval from Indian Affairs. Others who did not gain this status simply continued to live at Moose Deer Point or, with the consent of the bands at Christian Island and Parry Island, on the reserves of those bands.[210]

In 1877, Pottawatomi at Moose Deer Point applied to join the Parry Island Band. Superintendent Skene brought them to the attention of the Deputy Minister:

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[209] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 91). Clifton cites "Memorial, 1871, [NA,] RG 10, vol. 443," but there is no other information about this 1871 effort.

[210] Submissions on Behalf of the Government of Canada, August 7, 1997, p. 14; Chief and Principal Men, Parry Island, to Charles Skene, Visiting Superintendent of Indians, February 8, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 38-39); Charles Skene, Visiting Superintendent of Indians, to E.A. Meredith, Deputy Minister, Department of the Interior, February 23, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 40-42); E.A. Meredith, Deputy Minister, Department of the Interior, to Charles Skene, Visiting Superintendent of Indians, March 7, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 43-44); Charles Skene, Visiting Superintendent of Indians, to E.A. Meredith, Deputy Minister, Department of the Interior, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 46-47); L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to William Plummer, Indian Superintendent and Commissioner, January 29, 1879, NA, RG 10, vol. 2076, file 11130 (ICC Documents, p. 51); T.S. Walton, Indian Superintendent, to J.A. Macdonald, Superintendent General of Indian Affairs, July 7, 1887, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 89); R.V. Sinclair, for Deputy Superintendent General of Indian Affairs, to T.S. Walton, Indian Superintendent, July 15, 1887, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 90); T.S. Walton, Indian Superintendent, to J.A. Macdonald, Superintendent General of Indian Affairs, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 99); [L. Vankoughnet, Deputy Superintendent General of Indian Affairs,] to Thomas S. Walton, Indian Superintendent, March 22, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 100); George L. Chitty, Timber Inspector, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, November 29, 1889, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 103-03A); Resolutions of Non-Treaty Indians, Parry Island, November 29, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 117-19); Henry Jackson, Secretary to Non-Treaty Indians, to W.H. Bennett, MP, December 5, 1911, NA, RG 10, vol. 2963, file 206745, (ICC Documents, pp. 124, 124A, 124B and 125); Declaration of Christina Sunday, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 126-29); Declaration of Chief Thomas Peters Kadegwon, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 130-32); Declaration of Mrs Lewis King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 133-36); Declaration of John Q. King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 137-40); Henry Jackson, Secretary to Non-Treaty Indians, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 9, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 141-43); 1912 Applications from non-treaty Indians "to share in the annuity of the Indians known as the Beausoliel [sic] Band" (ICC Documents, pp. 144-92); A.G. Chisholm, Barrister & Solicitor, to Department of Indian Affairs, January 7, 1913, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 211, 211A, and 212); Members of the Christian Island Band to Superintendent General of Indian Affairs, February 3, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 213-15); Members of the Christian Island Band resident on Parry Island to Superintendent General of Indian Affairs, February 3, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 216).

> The Indians in question – named King – are non Treaty Indians and for some years have been settled upon Government Land near Moose [Deer] Point – about 45 miles south of Parry Sound – I am informed that originally they came from the United States about 30 years ago [1847] – belong to the Tribe called Potawattamies, and that for some time they lived upon Christian Island. They all belong to one Family – there being 3 Brothers, and the other men are their sons and nephews.[211]

The Parry Island Band was willing to let these Moose Deer Point Pottawatomi live on its reserve only if certain conditions of location, sobriety, and industry were met. Even then, they could not share in the band's moneys.[212]

In this and subsequent unsuccessful bids to gain full admission to the Parry Island and Christian Island Bands, the Kings of Moose Deer Point were described as descendants of Pottawatomi Chief Ogemawahj who had received presents at Penetanguishene, settled at Coldwater, and then moved to Christian Island.[213] How closely related the present Moose Deer Point members are to these families is difficult to determine largely because individuals were seldom named in this old departmental correspondence.

In 1878, Plummer noted the difficulties of settlement experienced by the 24 Pottawatomi families living in the Georgian Bay area:

> Some of them have lived on Christian Island and others at different points on the North Shore. They complain that as soon as they clear land and make any

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[211] Charles Skene, Visiting Superintendent of Indians, to E.A. Meredith, Deputy Minister, Department of the Interior, February 23, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, p. 41).

[212] Chief and Principal Men, Parry Island, to Charles Skene, Visiting Superintendent of Indians, February 8, 1877, NA, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 38-39); Charles Skene, Visiting Superintendent of Indians, to E.A. Meredith, Deputy Minister, Department of the Interior, February 23, 1877, RG 10, vol. 2005, file 7752 (ICC Documents, pp. 38-42); Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, pp. 33-34).

[213] Henry Jackson, Secretary to Non-Treaty Indians, to W.H. Bennett, MP, December 5, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 124, 124A, 124B, and 125); Declaration of Christina Sunday, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 126-29); Declaration of Chief Thomas Peters Kadegwon, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 130-32); Declaration of Mrs Lewis King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 133-36); Declaration of John Q. King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 137-40); Henry Jackson, Secretary to Non-Treaty Indians, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 9, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 141-43); 1912 Applications from non-treaty Indians "to share in the annuity of the Indians known as the Beausoliel [sic] Band" (ICC Documents, pp. 144-92).

> improvements, the Indians on whose Reserve they ventured to stop, or others outside of Indian Reserves have claimed the land and driven them away so that for years they have been buffetted [sic] about and driven from place to place. They are anxious to have a piece of land at some point on the North Shore of Georgian Bay where they will not be molested by whites, nor interfered with by other Indians.[214]

Characterizing them as "Canadian Indians, peaceable and industrious, and entitled to the Care and protection of our Department," Plummer suggested to the Minister of the Interior that some "unoccupied point" on the unsurrendered mainland between Penetanguishene and Moose Deer Point be set apart for their permanent occupation.[215] A year later, in January 1879, the Deputy Superintendent General of Indian Affairs asked Plummer to let him know "what extent of land you would recommend should be set apart" for these Indians.[216] If Plummer provided a response, no record of it has been located.

Plummer revived the issue of those at Moose Deer Point wanting a land base in his 1881 annual report:

> There are . . . about 25 families, numbering about 120 individuals, of the Otahwa [sic] and Pottawatamie tribes who came to this country from the United States many years ago and settled on Christian Island, a few of whom still remain there; but the greater portion, 19 families, have removed to "Moose Deer Point," on the north shore of Lake Huron, where they have built houses and brought some land under cultivation. They do not possess any lands nor participate in any money payments, but being of industrious habits, have managed, thus far, to support themselves pretty well.
>
> They have, at different times, expressed to me a strong desire to have a small tract at "Moose Deer Point," where they have settled, set apart for their exclusive use, as they fear that as the district becomes settled they will otherwise have no place to live.[217]

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[214] William Plummer, Indian Superintendent and Commissioner, to Minister of the Interior, January 15, 1878, NA, RG 10, vol. 2076, file 11130 (ICC Documents, pp. 48-50).

[215] William Plummer, Indian Superintendent and Commissioner, to Minister of the Interior, January 15, 1878, NA, RG 10, vol. 2076, file 11130 (ICC Documents, pp. 48-50). By 1883, Plummer had moved from the "Outside Service" to the position of first-class clerk at Headquarters, the "Inside Service."

[216] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to William Plummer, Indian Superintendent and Commissioner, January 29, 1879, NA, RG 10, vol. 2076, file 11130 (ICC Documents, p. 51).

[217] William Plummer, Indian Superintendent and Commissioner, to Deputy Superintendent General of Indian Affairs, Annual Report, December 14, 1881 (ICC Documents, p. 79).

In his annual report for 1882 – his last year of responsibility for the area – Plummer did not raise the issue again.[218]

Skene continued to be the Indian Superintendent at Parry Sound until 1885. Meanwhile, the Penetanguishene Agency, closer to Moose Deer Point, was reopened in 1883 under H.H. Thompson.[219] Thompson's annual reports for 1883 through 1889 do not mention the people at Moose Deer Point. He noted in 1883 that the Christian Island Indians wanted "the rest of the tribe" to move from Manitoulin and Parry Islands to Christian Island. Later, in 1889, he reported that the Chippewa Indians of Beausoleil, most of whom lived on Christian Island, were "happy and comfortable."[220]

Thomas Walton, MD, became Indian Superintendent at Parry Sound in 1885.[221] His account of the King family history, together with a petition from the Band, had the effect of having Alice King and some other children of Thomas King temporarily admitted to the Parry Island Band in 1888.[222] The Parry Island Chief and councillors were convinced that John King, through his marriage into the Band and his grandfather's loyalty to the British cause, should not be considered non-treaty.[223] Walton, who regarded King as "an exemplary Indian," focused on the apparent anomaly that King was entitled only to interest money while his wife and perhaps their children were entitled to interest money plus the Robinson Treaty annuity.[224]

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[218] William Plummer, Indian Superintendent and Commissioner, to Deputy Superintendent General of Indian Affairs, Annual Report, November 23, 1882 (ICC Documents, pp. 80-81); *The Canadian Almanac* (Toronto: Copp Clark, 1895-1926).

[219] Thompson remained the Superintendent at Penetanguishene for about a decade, until 1894: *The Canadian Almanac* (Toronto: Copp Clark, 1895-1926).

[220] H.H. Thompson, Indian Agent, Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, September 26, 1883 (ICC Documents, pp. 82-83); H.H. Thompson, Indian Agent, Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, August 26, 1884 (ICC Documents, pp. 84-85); H.H. Thompson, Indian Agent, Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, September 13, 1886 (ICC Documents, pp. 86-87); H.H. Thompson, Indian Agent, Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, September 24, 1888 (ICC Documents, pp. 93-97); H.H. Thompson, Indian Agent, Penetanguishene Agency, to Superintendent General of Indian Affairs, Annual Report, September 24, 1889 (ICC Documents, p. 101).

[221] *The Canadian Almanac* (Toronto: Copp Clark, 1895-1926).

[222] J.D. McLean, Secretary, Department of Indian Affairs, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, December 27, 1887, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 94); R.V. Sinclair, for Deputy Superintendent General of Indian Affairs, to T.S. Walton, Indian Superintendent, January 15, 1888, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 95)

[223] Chief and Councillors, Parry Island Band, to Thomas S. Walton, Indian Superintendent, July 7, 1887, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 88).

The King family history was told to Walton by Chief Megis of Parry Island, Chief James of Shawanaga, and John King. Their account had King's father, who died around 1862, being from Mackinaw at the juncture of Lake Michigan and Lake Huron:

> John King the son of Quasing [Ogemawahj] at Sturgeon Point near Waubaushene on the Georgian Bay about the year 1857 [sic]. Quasing now deceased about 15 years was a Pottawatami and was born and brought up at Macinaw. The British made a treaty with the Indians of Macinaw to which Quasing's father was a party. Prior to 1812 King's ancestors received presents from the British Government. During the Battles fought between the British and American forces at Macinaw the father of Quasing fought on the British side and as a reward for such conduct received a Medal which was shown to me about a year ago but which was unfortunately lost last Fall.
>
> John King never resided in the United States, he and his connections were always British.[225]

The apparently successful acceptance of King's children into treaty led the Parry Island Band and Walton to request permission to place King's name on the Robinson Treaty paylist of the Parry Island Band.[226] This request was denied on the basis that he was not entitled to Robinson Treaty annuities because "neither he nor his ancestors were interested in the country ceded by that Treaty, their habitat having been in the U.S. and, the birth place and place of residence of his father having been at Mackinaw."[227]

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[224] Thomas S. Walton, Indian Superintendent, to Superintendent General of Indian Affairs, July 7, 1887 (ICC Documents, p. 89).

[225] Thomas S. Walton, Indian Superintendent, to Superintendent General of Indian Affairs, December 19, 1887, RG 10, vol. 2381, file 78047 (ICC Exhibit 19).

[226] Chief and Councillors, Parry Island Band, to Thomas S. Walton, Indian Superintendent, December 10, 1888, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 98); Thomas S. Walton, Indian Superintendent, to Superintendent General of Indian Affairs, March 18, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 99).

[227] [L. Vankoughnet, Deputy Superintendent General of Indian Affairs] to Thomas S. Walton, March 22, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 100).

Furthermore, the Department's March 1889 reply suggested that the admission of John King's children may have been in error.[228] Departmental correspondence some 10 years later referred back to the spring of 1889 when members of the Christian Island Band were said to have been unhappy about the removal from the treaty paylist of certain individuals whom the Chief had considered as having been admitted to the Band.[229]

How to handle non-treaty Indians, some of whom were considered full members of treaty bands and others who were not, and what to do about Indians scattered along the St Clair River and shores of Georgian Bay with no permanent place of settlement were questions that would not go away. About the time Superintendent Thompson retired from the Penetanguishene Agency in 1894, the Inspector of Indian Agencies and Reserves, I.T. Macrae, recommended that the "claims which otherwise will constantly arise . . . be once and forever disposed of" by promoting the adoption of non-treaty Indians "into bands which have reserves upon such terms as would be fair to all concerned." If that was not feasible, he thought they should be given the opportunity to settle on either Manitoulin Island or Walpole Island. He recognized, however, that no one could be forced to go there: "Those tracts [Manitoulin and Walpole islands] were set apart for just such wanderers as these, but it might be found impossible to lead them to go to them." Macrae also recommended an enumeration of the individuals in question as a preparatory step.[230] However, as was the case when the Bagot Commission recommended that a census be taken almost 50 years earlier, no action was taken on the enumeration. As history shows, promoting settlement of non-treaty Indians with other First Nations was never a perfect solution.

Chief Paudash and the Historical Societies, 1904

In 1904, Frederick Myers, the president of the Peterborough Historical Society, contacted Indian Affairs about a group of "Ojibways" at Moose Deer Point:

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[228] [L. Vankoughnet, Deputy Superintendent General of Indian Affairs] to Thomas S. Walton, March 22, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 100).

[229] George Chitty, Timber Inspector, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, November 29, 1899, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 103-03A).

[230] I.T. Macrae, Inspector of Indian Agencies and Reserves, to Secretary, Department of Indian Affairs, November 13, [1894], NA, RG 10, vol. 1916, file 2752 (ICC Exhibit 16, doc. 7).

> We have been informed by [Robert] Paudash, Chief of the local tribe of Ojibways [at Rice Lake], that a small number of "non-treaty" Indians as he calls them at and about Moose [Deer] Point in Georgian Bay have been overlooked by the Brit. & Dom. Govts. in the distribution of their favours & rewards to former allies. These Indians received the war-medal but got neither land nor annuities. Paudash thought this very strange as they had come over as allies in the Rev^l War & did not dare to return. Will you be kind enough to inform me if this statement is correct, & if so, could anything be done for them.[231]

Chief Paudash started a chain of events that, in 13 years, eventually produced a land base for the Indians at Moose Deer Point.

The Department's first reaction – knowing nothing of Moose Deer Point or the Indians there[232] – was to forward the inquiry to C.L.D. Sims, the Indian Agent on Manitoulin Island, for information. Sims suggested the information be obtained from the Parry Sound Agency, which was "only a short distance" from Moose Deer Point.[233]

Rather than going to Moose Deer Point to learn about the people there, the Indian Agent at Parry Sound, W.B. Maclean, instead met with the Parry Island Band Chief, Peter Megis.[234] Based on this interview, Maclean advised headquarters that only one family of six Indians resided in the vicinity of Moose Deer Point: John King, his wife, three sons, and one daughter. Maclean further reported that they were non-treaty Indians who had been there about 20 years (since 1884) and were descended from Indians who had come from the United States and who had fought for the British during the "Revolutionary War."[235]

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[231] Frederick Myers, President, Peterborough Historical Society, to Department of Indian Affairs, May 21, 1904, NA, RG 10, vol. 3082, file 272 444 (ICC Documents, pp. 104-05)

[232] J.D. McLean, Secretary, Department of Indian Affairs, to W.B. Maclean, Indian Superintendent, Parry Sound, June 1, 1904, NA, RG 10, vol. 3082, file 272,444 (ICC Documents, p. 109).

[233] J.D. McLean, Secretary, Department of Indian Affairs, to C.L.D. Sims, Indian Agent, Manitowaning, May 26, 1904, NA, RG 10, vol. 3082, file 272444 (ICC Documents, p. 106); C.L.D. Sims, Indian Agent, Manitowaning, to J.D. McLean, Secretary, Department of Indian Affairs, May 28, 1904, NA, RG 10, vol. 3082, file 272444 (ICC Documents, p. 108).

[234] Superintendent Walton had approached "Chief Megis of Parry Island" in 1887 for information about the King family, but, from the information available, it is not known if this was the same individual consulted by Maclean 17 years later.

[235] W.B. Maclean, Indian Agent, Parry Sound, to J.D. McLean, Secretary, Department of Indian Affairs, June 9, 1904, NA, RG 10, vol. 3082, file 272444 (ICC Documents, pp. 114-15.).

Before Indian Affairs received this information from Maclean, a statement by Chief Paudash was read to the Ontario Historical Society on June 2, 1904. In it, Chief Paudash alluded to the Indians at Moose Deer Point as "descendants of those who came [circa 1812-13] with Tecumseh," and concluded: "I am sure that if their case was presented to the government they would get either land or annuity like ourselves."[236]

Headquarters relayed Maclean's information to the Peterborough Historical Society, adding: "A brother of John King (David L. King), also a non-Treaty Indian, resides on the Parry Island Reserve." The explanation for why the Moose Deer Point Indians lacked a reserve was the following:

> Provision was made by the Government for all the Indians who were allies of the British, including those who came over to this country from the United States, but a number of them did not settle on the reserve set apart for them, many of them being adopted into various bands with the consent of the Superintendent General, while others preferred to earn their living apart from any reserve.
>
> The annuities and interest moneys received by the Indians are payable to them on account of surrenders made by them to the Crown of lands, timber, etc.; and, as John King and family were not parties to any such surrender, they are not entitled to receive these payments.
>
> As King has not made application to the Department for any assistance, it is pretty evident that he has not required any or does not think he is entitled to any.[237]

Because this response is not specific, one is left to infer that "the reserve set apart for them" was probably Manitoulin Island.

Campaign for Inclusion in Christian Island Band, 1911-16

In November 1911, David L. King became involved with other non-treaty Indians of Parry Island in enlisting the assistance of Henry Jackson of Christian Island to act as their authorized "Secretary" in connection with their bid to be put on treaty paylists.[238] Non-treaty Indians at Christian Island and

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[236] J. Hampden Burnham, "The Coming of the Mississaugas" (1905) VI Ontario Historical Society, *Papers and Records* (ICC Documents, pp. 110-12).

[237] J.D. McLean, Secretary, Department of Indian Affairs, to Frederick Myers, President, Peterborough Historical Society, June 14, 1904, NA, RG 10, vol. 3082, file 272444 (ICC Documents, p. 116).

[238] Resolution of Non-Treaty Indians, Parry Island, November 29, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 117).

Moose Deer Point cooperated in this effort to deliver their claims to Indian Affairs through the Member of Parliament for Midland, Ontario, W.H. Bennett.[239]

Having obtained the history of the King (Ogemawahj) family from Chief Ogemawahj's grandson, Thomas King, Henry Jackson wrote to Bennett in December 1911.[240] Jackson's letter outlined the history of the King family, Ogemawahj's participation in the War of 1812, and the British promises to Ogemawahj:

> Both before and after the war of 1812 our forefathers lived [west of Lake Michigan] where the State of Wisconsin is now situated, and enjoyed the benefit of the British Government; and, when that war took place, our forefathers were asked to take part in it, and to help the Government to retain the country which they enjoyed.
>
> Chief Misquahzewan (father of Okemahwahjwon) being too old to command, after his people decided to fight for the British, gave the honour to his only son – Okemahwahjwon.
>
> Okemahwahjwon therefore commanded the Indian warriors, a thousand in number, and fought and won the Battle of Mackina Island [on July 17, 1812], in which the general and many officers of the United States Army were killed, and the army driven back to its vessels and so defeated.
>
> By reason of this our forefathers were promised and guaranteed by the British Government that from generation to generation they and their children's children should enjoy the protection of the Government.
>
> After the war was over various treaties were made between the United States and Great Britain, and a Boundary line was set; and Chief Okemahwahjwon then found himself and his people on the United States' side of that line. The British Government made the last distribution of annuity [presents] at Mackina Island, where the Commissioner announced and explained the Treaty to Chief Okemahwahjwon, and all his people, and made them to understand that they must [come or move] across the Boundary line inside of Six Years; and he guaranteed and promised that they should receive the full benefit from the Government, just as the other Indians did who already lived on the Canadian side of the line. Chief Okemahwahjwon and his people came across the border inside the limited time set by the British government, and were directed to come to Penetanguishene where the British military post used to be. There Chief Okemahwahjwon and his people received their first annuity [presents] on Canadian soil, and enjoyed the benefits guaranteed as before stated by

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[239] Resolution of Non-Treaty Indians, Parry Island, November 29, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 118-19); Resolution of Non-Treaty Indians, Christian Island, December 4, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 120-23).

[240] Henry Jackson, Secretary to Non-Treaty Indians, to W.H. Bennett, MP, December 5, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 124, 124A, 124B, 125).

> the British Government, and settled at Coldwater where Chief Assance lived who later on admitted Chief Okemahwahjwon and his people to his band. . . .[241]

In connection with this initiative by David L. King and Henry Jackson, about 20 applications for inclusion on the treaty paylists, and thus for full membership in the Christian Island (formerly Beausoleil Island) Band, were sent to Indian Affairs in 1912. These applicants, of mostly mixed Pottawatomi, Ottawa, and Chippewa backgrounds,[242] were convinced they had such rights because their ancestors not only had been loyal to Britain in a "time of peril," but also had given up "their ancestral homes to cross the boarder [sic] on the invitation of the Canadian government and to live under the same flag for which they had shed their blood."[243]

In December 1912, A.G. Chisholm, a lawyer based in London, Ontario, prepared a lengthy memorandum on behalf of these applicants for Charles McGibbon, the Inspector of Indian Agencies. Chisholm supplied information such as the relative numbers of Pottawatomi (51) and Ottawa (22), the names of family heads, and lines of descendancy. He retraced the history of the Beausoleil Band, including its membership and its moves from Coldwater to Beausoleil Island and later to Christian Island.[244]

In specific reference to the Pottawatomi, Chisholm described Chief Ogemawahj as the "head of the family of Pottawatamies who settled with the Beausoliel [sic] Band when they lived on Lake

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[241] Henry Jackson, Secretary to Non-Treaty Indians, to W.H. Bennett, MP, December 5, 1911, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 124, 124A, 124B, 125).

[242] Declaration of Christian Sunday, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 126-29); Declaration of Chief Thomas Peters Kadegwon, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 130-32); Declaration of Mrs Lewis King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 133-36); Declaration of John Q. King, January 12, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 137-40); Henry Jackson, Secretary to Non-Treaty Indians, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 9, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 141-43); 1912 Applications from non-treaty Indians "to share in the annuity of the Indians known as the Beausoliel [sic] Band" (ICC Documents, pp. 144-92).

[243] Henry Jackson, Secretary to Non-Treaty Indians, to Superintendent General of Indian Affairs, October 30, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 182, 183, 183A).

[244] Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 193, 193A, 194, 195).

Simcoe." While at Coldwater,[245] Ogemawahj "was placed on the list of annuitants at the instigation of old Chief John Assance, the head of the people or tribe, who afterwards became known as the Beausoliel [sic] Band." Chisholm noted that Ogemawahj and his people had later been struck off the Beausoleil list because they were "pagans" but, with the consent of the government, had been allotted land when they relocated with the Beausoleil Band to Christian Island. Ten families, all headed by men with the surname King, were listed by Chisholm as descendants of Ogemawahj, as well as a Mrs Joseph Laperinier and family.[246]

In Chisholm's view, the only reason that the applicants of Ottawa and Pottawatomi descent were not already on the lists was the "careless methods pursued in years past, when apparently from what we read, the Indian Department had nothing to do with the preparation of the lists of those entitled to share in the annuity."[247] No response from Indian Affairs to this memorandum has been found.

Petitions in 1914 from some of the members of the Christian Island Band[248] moved the Department to organize a vote on September 10, 1914, regarding the admission of non-treaty Indians to full membership in the Christian Island Band. The Chief and Council did not want any vote at all,[249] but the Department took the position that the admittance of non-treaty Indians – regardless of whether they were resident on Christian Island or elsewhere – "to full membership of the Christian Island Band [was] a matter solely for the Band to decide."[250]

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[245] Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 207).

[246] Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 200-01). The heads of households that Chisholm listed in 1912 as descendants of Ogemawahj were Edmerick King, James L. King, David Q. King, John Q. Kengis King, Mrs Joseph Laperinier, Thomas W. King, Albert A. King, David L. King, Adam D. King, Esau King, and James George King.

[247] Memorandum by A.G. Chisholm, December 17, 1912, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 204).

[248] Members of the Christian Island Band to Superintendent General of Indian Affairs, February 3, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 213-15); Members of the Christian Island Band resident on Parry Island to Superintendent General of Indian Affairs, February 3, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 216).

[249] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Chief Josiah G. Monague, Christian Island, September 9, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 233); Resolution of Christian Island Band Council, September 9, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 234-36).

For a long time, the Christian Island Band was painfully split over the issue of the status of the Pottawatomi. Those who opposed a vote worried about the Band sharing limited funds with increased numbers when "our capital and interest moneys are so small." They were upset by the "disturbance" caused by the issue and sought an end to it.[251] The numbers of potential members scared them. The Chief wrote:

> [W]e therefore refuse to admit non-treaty Indians by election, also because many of them who are not at all entitled to become members of the Band would fall in with the others, such as illegitimates and such like, also residents of other reserves are shown in the list made by Henry Jackson, and we therefore cannot and will not vote on the matter in question.[252]

In spite of this opposition, a vote was held.

McGibbon reported that he had taken a vote on September 10, 1914, over the vigorous objections of the Chief and council, who refused to participate.[253] There was no clear majority in favour of admitting non-treaty Indians, however. Headquarters instructed the Agent at Penetanguishene, C.J. Picotte, to tell the "non-treaty members" of the Christian Island Band to cease their agitation for admission to membership.[254]

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[250] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Charles McGibbon, Inspector of Indian Agencies, August 6, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 230).

[251] Chief Josiah G. Monague and Councillors, Christian Island Band, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 31, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 231-32); Resolution of Christian Island Band Council, September 9, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 234-36).

[252] Chief Josiah G. Monague and Councillors, Christian Island Band, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 31, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 231-32).

[253] Charles McGibbon, Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 14, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 240-43). Only 34 of 74 eligible voters actually voted and, although all 34 voted in favour of admitting the non-treaty Indians, McGibbon considered that the motion could only be carried with 38 votes in favour.

[254] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to C.J. Picotte, Indian Agent, Penetanguishene, September 15, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 247).

Inspector McGibbon's insistence on the vote seems to have been motivated by a desire for consistent departmental control. He favoured the inclusion of resident non-treaty Indians in the Band because he was uncomfortable with non-treaty Indians being born and living on the Christian Island Reserve when they lacked official recognition of their residency. Since they had "no other home," he thought "they should be subject to the same supervision as the Indians who are full members."[255]

The position of the Christian Island Chief and council in 1914 on the Pottawatomi question was clear: there should be a separate reserve for the Pottawatomi. In a petition to the Superintendent General, they contended that the 55 non-treaty Pottawatomi on their reserve "who came from the United States . . . about A.D. 1830 . . . have no rights whatever on our Reserve or to our funds and are complete strangers to us in that regard." They feared that Pottawatomi gaining full admission to the Band would take control and "drive your Petitioners out with nothing." A petition purporting to be on behalf of 94 members of the 134-member Band asked the Minister to give the Pottawatomi "a Reserve to themselves, or in the alternative to have them buy us out and give us another Reserve where we can start life over again."[256]

Discussion of this ongoing question and what should be done about it dragged on for several more years. A.G. Chisholm, the London lawyer, called for another vote in 1914, but the Department ignored him.[257] Then, in April 1915, the Band moved to admit just two individuals, John Sunday and Elijah King, whom the Agent described as being of good character.[258]

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[255] Charles McGibbon, Inspector of Indian Agencies, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 14, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 240-43).

[256] Petition, September 14, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 244-46).

[257] A.G. Chisholm, Barrister & Solicitor, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 22, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 248-49); J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to A.G. Chisholm, Barrister & Solicitor, September 28, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 259); A.G. Chisholm, Barrister & Solicitor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, October 1, 1914, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 260-61).

[258] C.J. Picotte, Indian Agent, Penetanguishene, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, May 1, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 269-70).

This 1915 vote was challenged by the non-treaty group on the grounds of insufficient notice.[259] The Agent for Christian Island could "not understand why they don't want John Sunday and Elijah King admitted into the Band after being so anxious to have them all admitted."[260] The Department investigated in 1915,[261] but there seems to have been no further correspondence on the subject until 1916, when Elijah King, John Sunday, and 25 other non-treaty residents were admitted to full membership.[262] The Agent was duly instructed to include them on the next paylist for the distribution of interest money.[263]

Land Base Acquired at Moose Deer Point, 1917

In 1916, about the time some non-treaty Pottawatomi and Ottawa Indians were making official inroads into the Christian Island Band, Indian Affairs received an inquiry that would change the circumstances of the non-treaty Indians "squatting" on Crown land at Moose Deer Point. Wallace Nesbitt, a former Supreme Court judge practising law in Toronto, contacted Deputy Superintendent General Duncan C. Scott in May 1916 on behalf of "Indians or Half-Breeds resident near the Adanac [sic] Club" who needed a school. Not only was Nesbitt well connected but he was familiar with the area, having built a cottage there around 1906 after hiring John King to help him investigate an 1879 shipwreck off Moose Deer Point.[264] On receiving Nesbitt's inquiry, Scott wrote for information on these squatters for his reply.[265]

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[259] Resolution of Christian Island Band, April 14, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 262); Resolutions of Christian Island Band Council, April 14, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 263-64); A.G. Chisholm, Barrister & Solicitor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 17, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 265).

[260] C.J. Picotte, Indian Agent, Penetanguishene, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, May 1, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 269-70).

[261] A.G. Chisholm, Barrister & Solicitor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 17, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 265); J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 21, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 266); A.G. Chisholm, Barrister & Solicitor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, April 21, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 267); J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to A.G. Chisholm, Barrister & Solicitor, April 22, 1915, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 265-68).

[262] "Members [of Christian Island Band] Voting on admission of Non-Treaty Indians," June 1, 1916, and "List of Names of Non-Treaty Indians admitted to Membership of the Christian Island Band," June 1, 1916, NA, RG 10, vol. 2963, file 206745 (ICC Documents, pp. 272-75).

[263] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to C.J. Picotte, Indian Agent, Penetanguishene, June 13, 1916, NA, RG 10, vol. 2963, file 206745 (ICC Documents, p. 281).

Individuals who had been granted land by the provincial government around Tadenac Bay (a few miles south of Moose Deer Point in Freeman Township) had, by 1890, organized themselves into the Tadenac Club of Toronto. When the Club incorporated in 1895, the lands of the individual members were transferred to the company. Soon the Club controlled about one-third of Freeman Township, and a survey map of 1902 located the "reclusive Pottawatomi community" at Moose Deer Point.[266]

J.D. McLean, Assistant Deputy and Secretary of Indian Affairs, personally visited the Indian village near the Tadenac Club's property in June 1916. On learning of the Indians' desire for land there, McLean anticipated difficulty with this request. His memorandum to the Deputy Superintendent General read:

> Joe Sandy [who was working for Nesbitt] stated that he had asked Hon. Mr. [W.J.] Hanna [the Secretary and Registrar for the Province of Ontario] about two years ago for 1200 acres of land near and including the village and also asked for a school. The land they desire is outside that controlled by the Tadanac [sic] Club and is, I understand, Crown land. The Indian village is located about one mile down from Hon. Mr. Nesbitt's cottage on Pa[r]tridge Bay, about 100 yds. back from the shore, and is on Crown land. If land were obtained in this neighbourhood and a school established, the only access to the site is by boat, and to remove the Indians to a locality more advantageously situated would be a difficult undertaking.[267]

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[264] Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, pp. 42-43).

[265] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to W.A. Orr, May 3, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 271).

[266] Franz M. Koennecke, "The Anishinabek of Moose Deer Point Reserve No. 79: A Historical View," June 30, 1983 (ICC Exhibit 9, p. 43).

[267] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, June 6, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 280).

During his visit to the Indian village, McLean found Nesbitt's "intelligent" contact Joe Sandy[268] and prepared a general report on the roughly 50 other men, women, and children of the mostly non-treaty settlement.[269]

Scott believed the request for 1200 acres, extending from Moose Deer Point to Moon River and the borders of the Tadenac Club property, was "too extensive." In a letter to Hanna, he said he expected that the Province of Ontario would not be willing to set apart so much land in that district, adding that in his view "200 or 300 acres of land would be all that would be required."[270]

Almost a year went by before there was any other action on the request. Scott had to follow up with Ontario's Minister of Lands, Mines, and Forests, G. Howard Ferguson, in February and August 1917. By August, the Indians had expressed concern that a lumber firm had bought the timber on the land they wanted for a reserve. Scott wrote to Ferguson: "I hope this rumour is not correct, as if the land is stripped of the timber, it will not be nearly so desirable as a location for the Indians."[271] As things turned out, all the timber in Freeman Township was subject to an old timber licence.[272] By September 1917, Indian Affairs' Timber Inspector, H.J. Bury, had met with Ferguson, who by then was willing to "grant a licence of occupation at a nominal rent."[273] Surveyor W.R. White of Indian Affairs' Survey Branch was dispatched by McLean to survey 500 or 600 acres for the proposed lease.[274] Albert Grigg of the province's Surveys Branch presumed that "two or three of the lots fronting on Moose Bay would be those required."[275]

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[268] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, June 6, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 280); Wallace Nesbitt to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 21, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 293).

[269] Joe Sandy's father was a non-treaty Indian of Christian Island. Archie King was born at Moose Deer Point and his wife drew interest money from Christian Island. Frank King was also born at Moose Deer Point and his wife drew interest from Rama. Charlie Isaac, born at Christian Island, was married to a woman who, until her death, drew interest from Christian Island. His house was at Twelve Mile Bay where he had cleared 15 acres. Mrs Williams was non-treaty and born at Christian Island. She and her children had cleared 25 acres at Twelve Mile Bay. A son, Billy Williams, lived at the village with his wife, who was from Rama. Another son, Dan Williams, married a member of Christian Island and had a clearing of 1 acre in the village. Yet another son, Jack Williams, married a non-treaty Indian of Parry Sound. John King, the Chief, born at Christian Island 60 years earlier and without holdings in the village, lived with his family at Rama, where his wife drew interest. Some men living in the village worked for cottagers or "in the [lumber] shanties." J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, June 6, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 276-80).

[270] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to W.J. Hanna, Secretary and Registrar, Province of Ontario, October 13, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 282).

[271] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Mines and Forests, Province of Ontario, February 6, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 284); Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests and Mines, Province of Ontario, August 22, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 288).

In September, Nesbitt asked for a halt to the cutting of hardwood. All Scott could reply was: "I hope we will have sufficient influence with the Hon. Mr. Ferguson to have the lands selected for the reserve eliminated from the timber license."[276] Nesbitt, whom the Department hoped would assist the surveyor, recommended that the reserve include portions west and south of Twelve Mile Bay.[277]

In October 1917, White reported 53 individuals in 12 families at Moose Deer Point, King's Bay. They seemed to be more or less the same families noted by Secretary McLean in 1916, with the addition of Wilson Isaac, John Isaac, and Sam Isaac as heads of households. Whereas McLean had described John King as having been born at Christian Island *circa* 1856, living mostly at Rama, and having no holdings in the village,[278] White wrote that John King and wife had "moved to this location

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[272] Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 19, 1917 (ICC Documents, p. 292); Wallace Nesbitt to D.C. Scott, Deputy Superintendent General of Indian Affairs, September 21, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 293).

[273] H.J. Bury, Timber Inspector, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 14, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 290).

[274] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, September 18, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 291).

[275] Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 19, 1917 (ICC Documents, p. 292).

[276] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Wallace Nesbitt, September 24, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 295).

[277] Wallace Nesbitt to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, September 24, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 293).

[278] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, June 6, 1916, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 276-80).

70 yrs. ago [circa 1837] from U.S. both non-treaty." The other 11 heads of households he described as "descendants of John King" and "born here."[279] As already mentioned, White also noted, but did not name, the four brothers of John King who came with him, "two going to Parry Island and two to Christian Island," with their descendants being admitted to memberships of the two bands at those locations.[280]

Referring to a "Plan No. 1706" which he had prepared, White described the Indians' improvements and clearings, and the agricultural efforts associated with each.[281] Joe Sandy's house was being used as the school, but White surveyed a portion of the same lot for a school.[282] White observed that the men of Moose Deer Point were "all lumbermen, working in the lumber camps in the winter time and guiding for tourists in the summer."[283] Lands in the locality, including those occupied by the Indians, were under timber licence to the Conger Lumber Company and the Muskoka Lumber Company.[284] In view of the rumour that wood on these lands was soon to be cut, White suggested early acquisition of the lands to preserve the wood for the Indians.[285]

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[279] The heads of households listed in 1917 were Joe Sandy, Archie King, Frank King, J. Williams, W. Williams, Dan Williams, Charles Isaac, Wilson Isaac, Mrs J. Williams, John King (Chief), John Isaac, and Sam Isaac. W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 296-99).

[280] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 296-99).

[281] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 296-99).

[282] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 298).

[283] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 29).

[284] The lots acquired for the Indians were under licence to the Conger Lumber Company (Lots 54, 44, 56) and the Freeman Lumber Company (all other lots): Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, December 18, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 317).

[285] W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to Duncan C. Scott, Superintendent General of Indian Affairs, October 11, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p.

On receiving White's report and survey plan, Scott advised Ferguson on October 12, 1917, that, at "King or Alexander Bay, Moose [Deer] Point, off Georgian Bay," the Indian improvements – fences, clearings, houses, orchards, and gardens –"must be considered as being fairly extensive in view of the nature of the country as they are only able to cultivate the valleys which have enough soil between the ridges of rock." The descendants of John King were considered to be "very industrious people" who worked in lumber camps and as guides. Scott added:

> [T]hey cannot be considered as hunters or fishermen as the only hunting or fishing done by them is a little for their own use. In the scale of living they appear to be quite superior to the ordinary northern Ontario Indian.[286]

Somehow, the character of the Indians at Moose Deer Point seemed to be a factor in the decision to create a reserve.[287]

Scott was well aware that the province was not very receptive to the idea of setting aside lands for Indians at Moose Deer Point. In Toronto, it had been suggested to White that the east half of Lot 54 in Concession 7 be withheld "as it would be valuable as a summer resort site," but Scott disagreed. He did not consider the site suited to summer resort purposes, but rather viewed it as "of

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[286] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests, and Mines, Province of Ontario, October 12, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 300-03).

[287] In writing to Ontario's Director of Surveys and Secretary to the Minister of Lands, Forests, and Mines, White extolled the virtues of the people at Moose Deer Point:

> I . . . found the Indians much farther advanced than I had expected, quite unlike the ordinary Indians. They are lumbermen, not poachers and fishermen as might have been supposed, and are especially useful in that locality. They are industrious and anxious to improve.

W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, to L. V. Rorke, Director of Surveys, and Mr Hels, Secretary to Minister, Ontario Department of Lands, Forests, and Mines, October 20, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 305-06). When White was advised that the province would be granting the land, the Deputy Minister of Lands and Forests wrote: "[I]t is hoped that the Indians will prove themselves good citizens and appreciate the action taken on their behalf": Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to W.R. White, Surveyor, Survey Branch, Department of Indian Affairs, October 20, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 307).

vital importance to the Indians as the eastern part contains a considerable portion of land suitable for cultivation."[288]

Scott's argument to the province was that, "[o]wing to the superior state of this band, and their extensive improvements," they "should be encouraged in every possible way." He therefore proposed "a grant of the lots on which the Indian improvements are situated, instead of a lease of occupation."[289] This amounted to only three fairly small and unconnected areas initially estimated to total 639 acres in the Township of Freeman, District of Muskoka.[290] The area exceeded the 200 or 300 acres first requested by Scott because, as the province acknowledged,"this Band of Indians is scattered and occupy portions of the different lots indicated on [White's plan]."[291] The province proposed 50 cents per acre as the price Indian Affairs should pay for the lands, and Canada agreed to this amount. Finally, at the end of 1917, after delays in completing the formal survey occasioned by inclement weather and the need to make routine adjustments in the way the lines were drawn, Canada paid $309.50 for what ultimately proved to be 619 acres.[292] The price excluded pine timber on the 619 acres which did not pass to the Indians. However, the province agreed to withdraw the lands from other timber licences upon receiving the purchase price from Canada.[293]

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[288] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests, and Mines, Province of Ontario, October 12, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 302).

[289] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests, and Mines, Province of Ontario, October 12, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 302).

[290] Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to G.H. Ferguson, Minister of Lands, Forests, and Mines, Province of Ontario, October 12, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 302-03); Duncan C. Scott, Deputy Superintendent General of Indian Affairs, to Wallace Nesbitt, October 13, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 304).

[291] [Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests and Mines] to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, October 20, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 308).

[292] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, November 21, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, pp. 312-13); Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, December 4, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 315); J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, December 15, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 316A).

Ontario's Order in Council of December 26, 1917, vested the 619 acres in Indian Affairs "for the use of the Indians residing on said lands." The rationale for establishing the reserve was vague: "In support of the application it is stated that the Indian men find employment as guides and caretakers during the summer and go to the lumbering woods in the winter, that it is desired to establish a school and enable them to grow garden stuff and provide fuel for their dwellings." The Order in Council made it clear that the province reserved "all mines, minerals and pine trees" for itself; however, in 1926, the pine trees were transferred to the federal Crown.[294] The province also reserved the right "to cancel the vesting of these lands should they at any time cease to be occupied or used by the Indians and their descendants now located thereon."[295]

Once Indian Affairs received this provincial Order in Council, it took no further action. There was no counterpart federal Order in Council accepting the transfer of land or formally setting it apart as a reserve.[296] Indeed, in 1921, when Chief Samuel Isaac sought some reassurance that the Moose Deer Point reserve was "safe from invasion,"[297] the Department simply forwarded him the provincial Order in Council.[298]

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[293] Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, December 18, 1917, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 317).

[294] "Crown Sale, Grant to His Majesty the King as represented by the Superintendent General of Indian Affairs [of] Pine Trees On Certain Lots in the Township of Freeman in the District of Muskoka," DIAND Land Registry Item X24538S (ICC Documents, pp. 340-41).

[295] Order in Council, Province of Ontario, December 28, 1917, DIAND Land Registry Item H46215 (ICC Documents, pp. 318-18A).

[296] Albert Grigg, Deputy Minister, Ontario Department of Lands, Forests, and Mines, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, January 7, 1918, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 319); Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 19.

[297] Wallace Nesbitt to J.G.A. Creighton, Law Clerk, Senate, August 18, 1921, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 337); J.G.A. Creighton, Law Clerk, Senate, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs, August 19, 1921, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 338).

[298] Acting Assistant Deputy and Secretary, Indian Affairs, to Chief Isaacs [sic], Moon Falls, Ontario, August 22, 1921, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 339).

In 1969, Canada granted portions of the Moose Point Indian Reserve to Freeman Township "for road purposes," reasoning that those portions were "not required for public purposes." What acreage this amounted to is not apparent from the descriptions in the grant.[299]

Request to Adhere to Robinson Treaties, 1932

By the early 1930s, most of Canada was experiencing the economic disaster known as the Great Depression. Although proximity to wealthy neighbours had been of some benefit to the Indians of Moose Deer Point, they asked again in May 1932 to be included in the Robinson-Huron Treaty. Under Chief Isaac, six men named Isaac and five named Williams signed a petition describing the community as the "direct descendants & Remnants of Tribes of Lake Huron Indians, in the County of Muskoka, Township of Freeman." They represented "about 40 individuals who are deprived and are awaiting the Government to negotiate the Treaties." Specifically, they asked "to enter under the Robinson Treaties, 1850, to draw the shares and Treaty monies this fall payment."[300]

The Acting Superintendent General of Indian Affairs, A.S. Williams, was aware that these individuals were Pottawatomi.[301] He was advised by the Department's Chief Accountant that the claims of descent would need to be investigated before any action could be taken.[302] Two weeks later, the official response from the Department was negative and intentionally discouraging:

> [W]e have no material on file which would support your application to be entitled to participate in these annuities. In fact any material we have on file is against such an application. While it may be true that some of you may be direct descendants of

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[299] Governor General in Council, Letters Patent, March 11, 1969, DIAND Land Registry Item R8704 (ICC Documents, pp. 356, 356A, 356B, 356C).

[300] Samuel Isaac and others to Superintendent General of Indian Affairs, May 13, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 342).

[301] A.S. Williams, Acting Deputy Superintendent General of Indian Affairs, to Mr Matheson, circa May 23, 1931, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 344A).

[302] F. Paget, Chief Accountant, Department of Indian Affairs, to A.S. Williams, Acting Deputy Superintendent General of Indian Affairs, May 23, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 344).

> Indians who were included in the said treaties, that of itself would not give you the right to participate.[303]

The Department did not offer to investigate the genealogy of any individuals, but instead simply relied on information received years earlier:

> Our information is that the majority of your people are descendants of John King who came to that location about 85 years ago from the United States. In view of this situation I regret that we are unable to entertain your claim.[304]

There is no evidence before the Commission to indicate whether the Moose Deer Point First Nation raised any further inquiries with the federal government prior to submitting its specific claim to the Department of Indian Affairs and Northern Development on April 6, 1995. Thus, the First Nation remains to this day a non-treaty band with a very small three-parcel reserve dotting Moose Deer Point.

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[303] T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, to Samuel Isaac and others, May 27, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 345).

[304] T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, to Samuel Isaac and others, May 27, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 345).

PART III

ISSUES

At the August 30, 1996, planning conference, Canada and the Moose Deer Point First Nation agreed that there are three primary issues in this inquiry:

1 **Were promises made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation?**

2 **If promises were made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation, what were the nature and the scope of the promises?**

3 **Does the Crown have an outstanding lawful obligation to the Moose Deer Point First Nation?**

Part IV of this report sets out our analysis of these three issues. In the first section, we will consider the factual question of whether promises made by the Crown in its addresses to the Indians in 1837 and at other times can be considered to have been made to ancestors of the present-day Moose Deer Point First Nation. The second part of our analysis will deal with the principles of treaty interpretation, the tests for determining the existence of a treaty, and the significance, if any, of concluding that promises made by Canada to a First Nation amount to a treaty as opposed to a mere agreement. Moreover, we will consider the capacity of the First Nation's ancestors to enter into a treaty or agreement, and the nature and scope of the promises, if any, made by the Crown to those ancestors. In particular, if we conclude that promises *were* made to the First Nation's predecessors, we will also be called upon to examine whether those promises included setting aside lands for the First Nation's use and occupation, protecting the First Nation in its use and occupation of those lands and other lands for traditional purposes, continuing to provide the First Nation with presents, and treating the Pottawatomi equally with other aboriginal peoples resident in Ontario.

Finally, we will address whether the Crown owes an outstanding lawful obligation to the Moose Deer Point First Nation.

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PART IV

ANALYSIS

ISSUE 1 PROMISES TO THE INDIANS

Were promises made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation?

The first issue in this inquiry involves questions of fact more than of law – namely, whether statements made by the Crown amounted to promises to its allies, and, if so, whether the allies to whom those promises were directed included ancestors of the Moose Deer Point First Nation. Our task is made easier by the following concession made by the Crown in its written submission:

> The evidence indicates that these Pottawatomi came to Canada after the War of 1812 for several reasons, including: actions taken by the Americans to move the Indians west; because they "did not dare to return" (ICC Doc. 104-105); in the hope of avoiding forcible assimilation into non-native culture (ICC Exhibit 9, at 18); and because of promises by the British that if they came to Upper Canada they would be "treated the same as other Indians." (ICC Doc. 419)
>
> One group eventually settled at Moose Deer Point. (ICC Doc. 38-39)
>
> Page 15 of the historical report prepared by Joan Holmes & Associates, Inc. in 1994 (ICC Exhibit 2) lists various members of the King family who completed applications for band membership, or who were listed in reports of non-treaty Indians residing on reserves. The report compares the names of the applicants, and the names of siblings and parents, with lists of individuals and families residing at Moose Deer Point, and concludes that the group of Indians residing at Moose Deer Point were descended from Chief Ogemahwahjwon, who had fought for the British in the War of 1812, and that they were descendants of the Pottawatomi who migrated to Canada in the 1830's or 1840's.
>
> Despite various inconsistencies and gaps in the historical record, for the purposes of this inquiry Canada accepts this conclusion as accurate.
>
> *Although there is no evidence that ancestors of the Moose Deer Point First Nation were present at the 1837 council at Manitouwaning [sic], there is evidence indicating that similar promises were likely made to the First Nation's ancestors at another council, probably in 1836, the last year presents were distributed at Macinac [sic] Island.*[305]

After reviewing various accounts of the promises made to Moose Deer Point ancestors in 1836, Canada concludes:

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[305] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 31. Emphasis added.

> It is Canada's position that the evidence discloses that promises were likely made by the Crown to the ancestors of the Moose Deer Point First Nation.[306]

Canada still disputes whether the ancestors to whom the promises were made had the capacity to treat with Canada, whether there was sufficient mutuality of promises to give rise to a treaty or even a mere agreement, and whether the parties intended to enter into a treaty in any event. However, from the foregoing statements, it can be seen that Canada has conceded that promises *were* made, and that the intended beneficiaries of those promises included ancestors of present members of the First Nation.

ISSUE 2 NATURE AND SCOPE OF THE CROWN'S PROMISES

> **If promises were made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation, what were the nature and the scope of the promises?**

It having been conceded by Canada that the first issue should be answered in the affirmative, the real point of contention is whether the nature of the promises is such that those promises can reasonably be construed as a treaty, and, if so, the effect of such a finding and the scope of the promises. To resolve these issues, we must first identify the criteria for determining whether the promises constituted a treaty, and in so doing we will review the principles of treaty interpretation to assist us in defining those circumstances in which a treaty can be said to exist. As required, we will also ascertain the consequences of finding that the promises constituted a treaty or an agreement, or both – or neither. Second, we must address certain factual questions: whether the First Nation had the *capacity* to treat or contract, whether there was a *mutuality* of promises flowing both to and from the Indians, and whether the circumstances demonstrate that the parties even *intended* to treat or contract. Third, we must examine the content of the promises. Finally, depending on Canada's subsequent actions in fulfilment of those promises, we can determine whether Canada owes an outstanding lawful obligation to the First Nation.

We turn now to the question of whether Canada's promises amounted to a treaty.

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[306] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 31.

Did the Promises Constitute a Treaty?

As the Commission noted in Part I of this report, the Moose Deer Point First Nation contends that the promises made to its ancestors by representatives of the British Crown in the 1830s amounted to a *treaty*. For its part, although Canada does not deny that promises were made to the ancestors of the First Nation, it puts forward the position in its written submissions that these promises at best amounted to a *contract* rather than a treaty. During oral submissions, however, Canada went further, arguing that the promises constituted *neither* a treaty nor an agreement[307] but rather a mere policy direction or unilateral announcement on the part of the British government.[308] Alternatively, Canada argues that, if the promises constituted an agreement (as opposed to a treaty), they could be terminated on reasonable notice and were, in fact, terminated in 1852 with respect to presents.[309]

The initial question facing the Commission, then, is whether the promises did in fact constitute a treaty. To answer this question properly, it is necessary to consider the constituent elements of a treaty at law.

Principles of Treaty Interpretation

The courts have been asked on a number of occasions to consider whether particular dealings between Canada and its aboriginal people have given rise to treaties, with the result that a number of principles have emerged which are instructive in the present inquiry. Counsel for the parties to this inquiry appear to concur that the leading cases in this area are the decisions of the Supreme Court of Canada in *Simon v. The Queen*[310] and *R. v. Sioui*.[311]

In *Simon*, the appellant, a registered Micmac Indian, was convicted under subsection 150(1) of Nova Scotia's *Lands and Forests Act* for illegal possession of a rifle and shotgun cartridges. Although the appellant admitted all the essential elements of the charges, he argued that the right to hunt set out in the Treaty of 1752, in conjunction with section 88 of the *Indian Act*, provided him with immunity from prosecution under the provincial statute. Article 4 of the treaty stated that the Micmacs have "free liberty of Hunting & Fishing as usual," and section 88 of the *Indian Act* provided that provincial laws of general application applied to Indians, *subject to the terms of any treaty*.

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[307] ICC Transcript, April 8, 1998, p. 120 (Perry Robinson).

[308] ICC Transcript, April 8, 1998, p. 122 (Perry Robinson).

[309] ICC Transcript, April 8, 1998, p. 120 (Perry Robinson).

[310] *Simon v. The Queen*, [1985] 2 SCR 387.

[311] *R. v. Sioui*, [1990] 1 SCR 1025, Lamer J.

One issue before the Supreme Court of Canada was whether the Treaty of 1752 was a "treaty" within the meaning of section 88 of the *Indian Act*. Macdonald JA of Nova Scotia's Supreme Court Appellate Division (Hart JA concurring) had expressed doubt that the Treaty of 1752 could be considered a "treaty" because it was merely a general confirmation of aboriginal rights and did not grant or confer "new permanent rights." He added that the treaty failed under section 88 because it was made by only a small portion of the Micmac Nation and did not define any land or area where the rights were to be exercised.

Before the Supreme Court of Canada, counsel for Canada argued that the Treaty of 1752 did not amount to a "treaty" under section 88 or the extended definition of "treaty" in *R. v. White and Bob*[312] because the treaty did not deal with the ceding of land or the delineation of boundaries. On behalf of the Court, Dickson CJ held:

> To begin, the fact that the Treaty did not create new hunting or fishing rights but merely recognized pre-existing rights does not render s. 88 inapplicable. On this point, Davey J.A. stated in *R. v. White and Bob*, *supra*, at p. 616:
>
>> The force of the first argument seems to depend upon the assumption that s. 87 [now s. 88] should be read as if it were subject only to rights created by the Treaty; that would remove from the saving clause rights already in being and excepted from or confirmed by a Treaty. That argument fails to accord full meaning to the words, "subject to the *terms* of any treaty . . ." In my opinion an exception, reservation, or confirmation is as much a term of a Treaty as a grant, (I observe parenthetically that a reservation may be a grant), and the operative words of the section will not extend general laws in force in any Province to Indians in derogation of rights so excepted, reserved or confirmed.
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> . . .

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[312] *R. v. White and Bob* (1964), 50 DLR (2d) 613 (BCCA), affirmed [1965] SCR vi, 52 DLR (2d) 481.

> With respect to the respondent's submission that some form of land cession is necessary before an agreement can be described as a treaty under s. 88, I can see no principled basis for interpreting s. 88 in this manner. I would adopt the useful comment of Norris J.A. of the British Columbia Court of Appeal in *R. v. White and Bob, supra*, affirmed on appeal to this Court. In a concurring judgment, he stated at pp. 648-49:
>
>> The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of s. 87 [now s. 88] of the *Indian Act*, Parliament is to be taken to have had in mind the common understanding of the parties to the document at the time it was executed. In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.
>
> In my view, Parliament intended to include within the operation of s. 88 all agreements concluded by the Crown with the Indians that would otherwise be enforceable treaties, whether land was ceded or not. None of the Maritime treaties of the eighteenth century cedes land. To find that s. 88 applies only to land cession treaties would be to limit severely its scope and run contrary to the principle that Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians.
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> Finally, it should be noted that several cases have considered the Treaty of 1752 to be a valid "treaty" within the meaning of s. 88 of the *Indian Act*. . . . The Treaty was an exchange [of] solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man and, as such, falls within the meaning of the word "treaty" in s. 88 of the *Indian Act*.[313]

From these passages it can be seen that land cession is not an essential element of treaty making. Moreover, treaties can merely *recognize* and *confirm* pre-existing rights and need not *create* new ones. Just as significant, however, is Chief Justice Dickson's comment that the word "treaty" is not a term of art. Rather, a treaty is an exchange of solemn promises embracing "all such engagements made by persons in authority as may be brought within the term 'the word of the white man'" and giving rise to enforceable obligations between Indians and the Crown. From this definition we infer that it is not necessary to find that the Crown and the Indians in a given case intended to enter into a *treaty*, but instead that they merely intended to enter solemn engagements creating binding obligations. In other words, the parties were not required to turn their minds to whether the transaction into which they were entering was properly termed a "treaty"; the courts will consider the transaction to be a "treaty" if, in substance, that is what it was.

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[313] *Simon v. The Queen*, [1985] 2 SCR 387 at 409-10, Dickson CJ. Original emphasis.

In our view, this conclusion is confirmed in the reasons of Lamer J (as he then was) on behalf of the Court in *Sioui*. In that case, the respondent Indians had been convicted of cutting down trees, camping, and making fires in undesignated areas of Jacques-Cartier Park contrary to sections 9 and 37 of the *Regulation respecting the Parc de la Jacques-Cartier*, which had been adopted pursuant to Quebec's *Parks Act*. As in *Simon*, the respondents admitted committing the acts proscribed by the statute, but they alleged they were practising ancestral customs and religious rites that were the subject of a treaty between the British and the Huron, thereby affording them the protection of section 88 of the *Indian Act*. Lamer J stated:

> Our courts and those of our neighbours to the south have already considered what distinguishes a treaty with the Indians from other agreements affecting them. The task is not an easy one. In *Simon v. The Queen*, [1985] 2 S.C.R. 387, this Court adopted the comment of Norris J.A. in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) (affirmed in the Supreme Court (1965), 52 D.L.R. (2d) 481), that *the courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians*. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration.[314]

Lamer J described the constituent elements of a treaty in these terms:

> [I]t is clear that *what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of*

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[314] *R. v. Sioui*, [1990] 1 SCR 1025 at 1035, Lamer J. Emphasis added.

> *solemnity*. In the Court of Appeal [in *Simon*] Bisson J.A. in fact adopted a similar approach when he wrote (at p. 1726):
>
> > [TRANSLATION] I feel that in order to determine whether document D-7 [the document of September 5,1760] is a treaty within the meaning of s. 88 of the *Indian Act*, the fundamental question is as follows: is it an agreement in which the contracting parties . . . intended to create mutual obligations which they intended to observe solemnly?[315]

This excerpt demonstrates three criteria for determining the existence of a treaty: intention, mutuality, and solemnity. Canada has argued that a fourth criterion – the *capacity* of the assembled Pottawatomi to enter into a treaty – must also be considered. On this point, Lamer J appears to concur, as can be seen from his comments in *Sioui*:

> As the Chief Justice said in *Simon, supra*, treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians (at p. 410). In our quest for the legal nature of the document of September 5, 1760, therefore, we should adopt a broad and generous interpretation of what constitutes a treaty.
>
> In my opinion, this liberal and generous attitude, heedful of historical fact, should also guide us in examining *the preliminary question of the capacity to sign a treaty*, as illustrated by *Simon* and *White and Bob*.[316]

We will deal with each of these criteria in turn shortly. First, however, we will consider what the courts have said regarding the sort of evidence we may consider in assessing these criteria.

From the first of the foregoing quotations from *Sioui*, it can be seen that we "must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration." Lamer J expanded on this point, noting that a "more flexible approach" to the use of historical evidence is to be taken in determining the *existence* of a treaty than in *interpreting* a treaty that has already been found to exist:

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[315] *R. v. Sioui*, [1990] 1 SCR 1025 at 1044, Lamer J. Emphasis added.

[316] *R. v. Sioui*, [1990] 1 SCR 1025 at 1035-36, Lamer J.

> As this Court recently noted in *R. v. Horse*, [1988] 1 S.C.R. 187, at p. 201, extrinsic evidence is not to be used as an aid to interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement. This rule also applies in determining the legal nature of a document relating to the Indians. However, a more flexible approach is necessary as the question of the existence of a treaty within the meaning of s. 88 of the *Indian Act* is generally closely bound up with the circumstances existing when the document was prepared (*White and Bob*, *supra*, at pp. 648-49, and *Simon*, *supra*, at pp. 409-10). In any case, the wording alone will not suffice to determine the legal nature of the document before the Court. On the one hand, we have before us a document the form of which and some of whose subject-matter suggest that it is not a treaty, and on the other, we find it to contain protection of fundamental rights which supports the opposite conclusion. The ambiguity arising from this document thus means that the Court must look at extrinsic evidence to determine its legal nature.[317]

As Roscoe and Bateman JJA (Flinn JA concurring) emphasized in *R. v. Marshall*:

> The "more flexible" approach referred to above, is endorsed, then, only in determining whether the document is, in fact, a treaty, rather than with respect to the interpretation of that treaty, once found to exist, in the absence of ambiguity.[318]

Justice Lamer's approach may not appear to be significantly more "flexible" if it is viewed as merely permitting the admission of extrinsic evidence where the existence of the treaty is ambiguous. Extrinsic evidence is commonly allowed to resolve ambiguity, although in most circumstances that evidence is directed to the *meaning* of the instrument rather than its *existence*. However, Lamer J also noted that the question of whether a treaty exists is "closely bound up with the circumstances existing when the document was prepared," and that "the wording alone will not suffice to determine the legal nature of the document before the Court." We take this to mean that extrinsic evidence is admissible in such circumstances not solely because of ambiguity, but because we are concerned with determining the legal significance or status of the instrument and not simply its meaning. In any event, a central issue in this inquiry is the legal significance of the promises made to the Pottawatomi in 1837, and we have no doubt that the sort of "ambiguity arising from [the] document" referred to by

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[317] *R. v. Sioui*, [1990] 1 SCR 1025 at 1049, Lamer J.

[318] *R. v. Marshall* (1997), 146 DLR (4th) 257 at 266 (NSCA).

Lamer J in *Sioui* is also evident in this case: "On the one hand, we have before us a document the form of which and some of whose subject-matter suggest that it is not a treaty, and on the other, we find it to contain protection of fundamental rights which supports the opposite conclusion."

These principles find additional support and analysis in *R. v. Côté*,[319] in which the Quebec Court of Appeal was asked to determine whether a particular agreement between the British Crown and certain Algonquin nations in 1760 constituted a treaty as defined in section 88 of the present-day *Indian Act*. On behalf of a 2-1 majority, Baudouin JA concluded that it did:

> Concerning the proof of such treaties, the situation in aboriginal law is different from what we usually encounter. In the first place, a number of these agreements were not always reduced to writing and, in many cases, the common aboriginal custom was to acknowledge their existence through a mere exchange of wampum and to commit them to the collective memory. Furthermore, the colonizer was in most cases in a position of superiority, if only because the legal concepts used were in some cases unknown to the aboriginal people or hard to understand or grasp in their cultures. That is why the Supreme Court has established some exceptional but nevertheless precise rules in such matters, rules that are binding on the lower courts.
>
> The first such rule is that any agreement made in principle be considered to be a true treaty even if it does not have the form of one, notwithstanding some reluctance on the part of some lower courts: see *Delgamuukw v. British Columbia, supra*. Thus any pact, alliance, agreement or arrangement may constitute a treaty within the meaning of s. 88 of the *Indian Act*: *R. v. Simon, supra*; *R. v. Sioui, supra*, at p. 441 *et seq*. As Lamer J. wrote, in Sioui (at p. 441): ". . . what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.". . .
>
> The second such rule is that it is sometimes necessary, in the absence of a written text acknowledging the agreement, to be content with secondary evidence, of lesser quality, hearsay evidence, and thus to derogate consciously from the ordinary rules. This principle was first laid down in *Nowegijick v. Canada, supra*, was repeated in *Guerin v. Canada, supra*, and was spelled out still more recently in *Mitchell v. Peguis Indian Band, supra*. In the latter judgment, Chief Justice Brian Dickson stated in relation to the *Nowegijick* judgment (at p. 202):
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>> The *Nowegijick* principles must be understood in the context of this court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society . . . It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretative approach applies to any

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[319] *R. v. Côté* (1993), 107 DLR (4th) 28 at 46 (Que. CA), Baudouin JA.

> statute relating to Indians, even if the relationship thereby affected is a private one. Underlying *Nowegijick* is an appreciation of societal responsibility, and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.

La Forest J., concurring but on other grounds, was of the same opinion (at p. 236):

> I note at the outset that I cannot take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.[320]

Notwithstanding his finding that the agreement constituted a treaty, Baudouin JA later concluded that the province was justified in interfering with the Indians' treaty rights in that case.

On the basis of these principles, we can now consider whether the promises made by the British Crown to the ancestors of the Moose Deer Point First Nation constituted a treaty. We will assess whether the parties *intended* to create obligations, whether *mutually binding* obligations were in fact created, and whether the proceedings involved a measure of *solemnity*. First, however, in keeping with the comments of Lamer J, we will address as a preliminary issue the capacity of the parties to enter into a treaty in the first place.

Capacity to Enter into Treaty

At the outset, we should clearly state that, although Canada raises the issue of the capacity of the parties to enter into a treaty, there is no issue regarding the capacity or authority of S.P. Jarvis who, as the Chief Superintendent of Indian Affairs, was the Crown's representative at the council of 1837. As counsel for the First Nation noted, Jarvis was expressly authorized and directed by Lieutenant

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[320] *R. v. Côté* (1993), 107 DLR (4th) 28 at 46-47 (Que. CA), Baudouin JA.

Governor Head to give the 1837 address that, had he not been called away owing to the death of King William IV, Head would likely have delivered himself. It was open to the Indians to assume reasonably that Jarvis had the authority to enter into treaties on behalf of the Crown,[321] and this fact has been expressly acknowledged by counsel for Canada.[322]

Where Canada differs from the First Nation is in its view of the representative capacity of the Indians in attendance at Jarvis's 1837 address to bind their nation to the fulfilment of any promises made to the Crown at that time.[323] From Canada's perspective, the First Nation faces "a real technical problem" because treaty making takes place "nation to nation," and there is no evidence of anyone in attendance at the 1837 address who could make binding promises on behalf of the present-day First Nation.[324] Canada submits that the First Nation has failed to establish that any of its ancestors were actually present during the address, or that Ogemawahj or anyone else had the authority to act on behalf of the Pottawatomi or even purported to do so.[325] Counsel stresses that those in attendance were simply "3,700 Indians of different tribes and from various regions," and that no care was taken to identify Chiefs or principal men.[326] Finally, Canada submits that cases such as *Simon*, *Sioui*, and *Mitchell* demonstrate that First Nations can rely only on promises made to "ascertainable parties," such as members of the First Nation or their ancestors; given that the parties to a treaty must have the capacity to treat, the appropriate parties are the Crown and "a tribe or nation of Indians."[327] Indeed, having regard for the social and political structures of the Pottawatomi in the early 1800s, organized as they were by village, Canada suggests that "it would have been difficult for the Pottawatomi Nation at that time to have come up with one individual with the authority to bind the whole Pottawatomi Nation."[328] In support of this statement, Canada cites anthropologist James Clifton:

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[321] Written Submission on behalf of the Moose Deer Point First Nation, August 1, 1997, p. 66; ICC Transcript, April 8, 1998, p. 84 (Gary Nelson).

[322] ICC Transcript, April 8, 1998, p. 125 (Perry Robinson).

[323] It is interesting that, having argued that there were no representatives present who could bind the First Nation to the fulfilment of promises made *to the Crown*, Canada also argues that there was none of the mutuality of consideration required for treaty making because no promises were actually made *to the Crown* in any event. We will return to this argument later in this report.

[324] ICC Transcript, April 8, 1998, p. 127 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 4.

[325] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 45.

[326] ICC Transcript, April 8, 1998, p. 129 (Perry Robinson).

[327] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 44.

> By 1820 the Potawatomi yet constituted a single segmentary tribal organization whose villages were scattered across a very extensive tribal estate. The most important economic-political-geographic unit was the village. . . . Although it has become customary for historians and anthropologists to identify a number of supposedly autonomous "bands" in this era, there is no evidence that the Potawatomi themselves recognized such formal, sub-tribal divisions, each with autonomous control over a portion of the tribal estate.[329]

Canada submits that the promises were "made to all Indians who had served as British allies, rather than to an identifiable group of Indians as was the case in both the *Sioui* and *Côté* cases," and that there is no case law indicating that "a treaty has been entered into with simply a body of assembled Indians."[330]

On the factual level, the Moose Deer Point First Nation responds that, although there may be no clear proof of Ogemawahj's presence during the 1837 address, there is evidence suggesting that he may well have been there. According to the First Nation, Ogemawahj crossed the border in 1835 and resided with Chief Aisance at Coldwater and later at Christian Island. Both men were present in 1852 when Indian Superintendent T.G. Anderson announced that presents would be terminated. Counsel submits that, even if the Commission is not prepared to accept the inference that Ogemawahj attended Jarvis's address, it was in the Crown's interest to see that the substance of the address received broad publicity to all its native allies. Accordingly, it is likely that the First Nation's ancestors learned the substance of the address shortly after Jarvis spoke.[331] In any event, the First Nation appears to consider the factual question as something of a "red herring," given Canada's concession that substantially the same promises were made to Ogemawahj and other ancestors before 1837.[332]

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[328] ICC Transcript, April 8, 1998, p. 130 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 4.

[329] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 91); Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 45.

[330] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 46; ICC Transcript, April 8, 1998, pp. 126-27.

As to Canada's argument that there can be no valid treaty unless a tribe or nation is a party, the First Nation responds that, as a matter of practice and policy, the Crown always dealt with whatever body of Indians seemed appropriate in the circumstances. Stating that negotiating with a tribe or nation was merely "a preference but not a requirement for a valid treaty," counsel referred to Treaties 4, 6, and 7 as evidence that the Crown had negotiated with groups of Indians notwithstanding that an entire nation was not present and that some of the principal men and Chiefs were absent.[333] Counsel further contends that, should negotiation with a tribe or nation be treated as a requirement of treaty making, "that would invalidate a whole slew of treaties across this entire country," and, as Canada has suggested, it would likely mean that the Pottawatomi could never have entered into a treaty at all.[334] The First Nation argues that the Crown never intended that the promises "could only be taken up by entire nations or tribes"; rather, the promises were made with the intent that they would be widely disseminated to all Britain's native allies in the United States and could be accepted by anyone – whether organized by band, clan, clan segment, or other group – who chose to settle permanently in Canada.[335] Accordingly, Canada's suggestion that treaty negotiations can involve only "ascertainable parties" is, in the First Nation's view, without merit. Citing the venerable case of *Carlill v. Carbolic Smoke Ball Company*,[336] counsel argued that, although the benefits of the Crown's promises were offered widely to that large number of Indians who might accept by performance of the required condition – namely, permanent settlement in Canada – a binding agreement would only arise between the Crown and the more limited number of Indians who actually came forward and performed the condition.[337] The common law, in counsel's submission, supports contracts formed by the performance of the prescribed condition, without more being required.[338]

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[331] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 5 and 12-13; ICC Transcript, April 8, 1998, pp. 40 and 45 (Gary Nelson).

[332] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 13.

[333] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 14-15; ICC Transcript, April 8, 1998, pp. 180-82 (Gary Nelson).

[334] ICC Transcript, April 8, 1998, pp. 179 and 182 (Gary Nelson).

[335] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 15.

[336] *Carlill v. Carbolic Smoke Ball Company*, [1893] 1 QB 256 (Eng. CA).

In reply, Canada contends that, although *Carlill* may be applicable to the creation of legal relationships between ordinary citizens, "[g]overnments cannot be bound by undertakings that are tacitly accepted by conduct."[339] In so saying, counsel relies on the following excerpt from *The Law of Contract in Canada* by G.H.L. Fridman:

> Where a government or governmental body has set out its intention of doing something, for example, paying subsidies, or allowing remission of taxes vis-à-vis members of a certain group, for example, mining companies, or to a specific person or organization, it has been held that such statements of policy, whether contained in a statute or Order in Council, or mere directive, are not offers capable of becoming binding by acceptance by words or conduct on the part of the specific addressee of the statement or any member of the group affected thereby.[340]

The First Nation counters that this excerpt relates only to the legislative branch of government dealing with non-aboriginal matters, and that it is entirely within the scope of the Crown acting in its executive capacity to make treaties with First Nations, including treaties arising from circumstances similar to those in the *Carlill* case.[341]

The arguments presented to the Commission with respect to capacity must be assessed from two perspectives. One assessment must be from the perspective of general principles of international law, considering Canada's argument that treaties must be created on a "nation-to-nation" basis. The second assessment must be from the perspective of the legal principles relating to capacity as they apply to the ability of the First Nation's ancestors to treat with representatives of the British Crown.

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[337] Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 68; Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 16; ICC Transcript, April 8, 1998, pp. 91-92 and 94 (Gary Nelson).

[338] Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 71; Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 12.

[339] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 12.

[340] G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto: Carswell, 1986) at 25.

[341] ICC Transcript, April 8, 1998, pp. 197-98 (Gary Nelson).

With regard to the first of these assessments, the cases are clear that a treaty between the Crown and its Indian subjects, as contemplated by section 88 of the *Indian Act* or subsection 35(1) of the *Constitution Act, 1982*, is quite different from an international treaty. Baudouin JA commented on this distinction in *Côté*:

> The actual notion of a treaty, in the current legal language, refers to an instrument by which the governments of two or more competent states establish rules or make certain decisions. In the context of aboriginal law, we should not confine ourselves to such a restrictive definition, if only because *the agreements signed between the French or English colonizers and particular aboriginal groups were, in most cases, agreements not between two governments of sovereign states but between a government and a nation or a part of a nation*. As the Supreme Court of Canada said in *R. v. Simon, supra*, a treaty with aboriginal people is a *sui generis* agreement, which does not necessarily follow the classic rules of public international law.[342]

It is noteworthy that Baudouin JA refers to an agreement "between a government and a nation *or a part of a nation*."

As we have seen, *Côté* considered the largely factual issue of whether a particular agreement between the British Crown and certain Algonquin nations in 1760 constituted a treaty under the *Indian Act*. By way of contrast, in *Mitchell v. Minister of National Revenue*,[343] McKeown J of the Federal Court, Trial Division, was called upon to consider the legal question of whether an *international* treaty can similarly be considered a "treaty" for the purposes of subsection 35(1) of the *Constitution Act, 1982*. In answering the question, McKeown J relied in part on *Francis v. R.*,[344] a case in which the Supreme Court of Canada addressed a similar question in relation to section 88 of the *Indian Act*:

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[342] *R. v. Côté* (1993), 107 DLR (4th) 28 at 46 (Que. CA), Baudouin JA. Emphasis added.

[343] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 (FCTD).

[344] *Francis v. R.*, [1956] SCR 618.

> The [Ontario] Court of Appeal [in *R. v. Vincent*[345]] found that the Jay Treaty, as an international treaty, is not a treaty within the meaning of s. 35(1) of the Constitution. Section 35(1) refers only to rights arising from treaties concluded with Aboriginal peoples. . . . Section 35(1) does not create rights. It only recognizes and affirms existing rights. An international treaty is one between the nations who are parties to the treaty, and the rights created or conferred by an international treaty belong exclusively to the sovereign countries which are contracting parties to it. In order for individual members of those nations to have rights under the treaty, the treaty must have been implemented by national legislation. . . .
>
> This decision was based in part on the Supreme Court of Canada's decision in *Francis v. R.*, [1956] S.C.R. 618 at 631, wherein Kellock J. stated:
>
> > I think it is quite clear that "treaty" in this section [section 88 of the Indian Act] does not extend to an international treaty such as the Jay Treaty but only to treaties with Indians which are mentioned throughout the statute.
> >
> > In my opinion, the provisions of the Indian Act constitute a code governing the rights and privileges of Indians, and except to the extent that immunity from general legislation such as the Customs Act or the Customs Tariff Act is to be found in the Indian Act, the terms of such general legislation apply to Indians equally with other citizens of Canada.
>
> The Court of Appeal reviewed a number of other decisions and found that the word "treaty" has always had the meaning of a treaty between the Crown and the Indians. There is no court decision which gives it the meaning of an international treaty. . . .[346]

From the *Côté* and *Mitchell* cases, it can be seen that a treaty between the Crown and Indians is not the equivalent of a treaty in international law. As Dickson CJ stated in *Simon*, principles of international treaty law are "not determinative" because "an Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."[347] Nor are treaties ordinary contracts in the sense of being binding only on those signing them.[348] For these reasons, we must be wary of applying strict rules of interpretation under contract law and international law to these *sui generis* agreements, for which the courts have developed unique rules of construction and enforcement.

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[345] *R. v. Vincent* (1993), 12 OR (3d) 427, [1993] 2 CNLR 165.

[346] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 180-81 (FCTD).

[347] *R. v. Simon*, [1985] 2 SCR 387 at 404, Dickson CJ.

[348] Shin Imai, Katherine Logan, and Gary Stein, *Aboriginal Law Handbook* (Toronto: Carswell, 1997), 26.

Having considered the applicability of principles of international law, we now turn to the application of the principles relating specifically to capacity. There are three cases of particular interest. The first is *Simon*, where Dickson CJ was required to decide whether the Treaty of 1752 was validly created by competent parties. In doing so, he felt constrained to distance himself from the widely debated 1929 Nova Scotia County Court decision in *R. v. Syliboy*,[349] in which Acting Judge Patterson made the following comments, ostensibly based on principles of international law, regarding the Indians' lack of status to enter into a treaty:

> "Treaties are unconstrained Acts of independent powers." But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty[,] even of ownership[,] were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.
>
> Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual – an agreement that, as we have seen, was very shortly after broken.[350]

In response to these reasons, Dickson CJ stated:

> It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language

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[349] *R. v. Syliboy*, [1929] 1 DLR 307 (NS Co. Ct).

[350] *R. v. Syliboy*, [1929] 1 DLR 307 (NS Co. Ct) at 313-14.

> is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing.[351]

Chief Justice Dickson then referred to an article entitled "Indians and Treaties in Law" in which N.A.M. MacKenzie, in disagreement with the ruling of Patterson J that the Indians did not have the capacity to conclude a valid treaty, stated:

> As to the capacity of the Indians to contract and the authority of Governor Hopson to enter into such an agreement, with all deference to His Honour, both seemed to have been present. Innumerable treaties and agreements of a similar character were made by Great Britain, France, the United States of America and Canada with the Indian tribes inhabiting this continent, and these treaties and agreements have been and still are held to be binding. . . . Ordinarily "full powers" specially conferred are essential to the proper negotiating of a treaty, but the Indians were not on a par with a sovereign state and fewer formalities were required in their case.[352]

Dickson CJ then concluded:

> The Treaty was entered into for the benefit of both the British Crown and the Micmac people, to maintain peace and order as well as to recognize and confirm the existing hunting and fishing rights of the Micmac. In my opinion, both the Governor and the Micmac entered into the Treaty with the intention of creating mutually binding obligations which would be solemnly respected. It also provided a mechanism for dispute resolution. The Micmac Chief and the three other Micmac signatories, as delegates of the Micmac people, would have possessed full capacity to enter into a binding treaty on behalf of the Micmac.[353]

It is noteworthy that, after quoting the excerpt from MacKenzie's article, Dickson CJ did not dispute the statement that "the Indians were not on a par with a sovereign state and fewer formalities were required in their case." We infer that the more important feature of the negotiations was the intention to create mutually binding obligations that would be solemnly respected. While Dickson CJ referred to the Chief and three other Micmac signatories "as delegates of the Micmac people" with "full capacity to enter into a binding treaty on behalf of the Micmac," we do not take him to have ruled that, in appropriate circumstances, other delegates could not have been selected by the Micmacs or other informal means of concluding a treaty could not have been chosen.

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[351] *Simon v. The Queen*, [1985] 2 SCR 387 at 399, Dickson CJ.

[352] N.A.M. MacKenzie, "Indians and Treaties in Law" (1929), 7 *Can. Bar Rev.* 561 at 565.

[353] *Simon v. The Queen*, [1985] 2 SCR 387 at 401, Dickson CJ.

The second case to offer relevant discussion on the question of the Indians' capacity to enter into a treaty is *Sioui*. Although that case involved an actual document, the Province of Quebec argued that the document did not constitute a treaty, in part because the Huron Indians lacked the capacity to enter into one. In finding that the Indians in fact had the requisite capacity, Lamer J differentiated between the requirements for capacity in the context of international treaties between European nations and the lesser requirements in the context of relations between a European nation and the aboriginal peoples of North America:

> Such a document could not be regarded as a treaty so far as the French and the Canadians were concerned because under international law they had no authority to sign such a document: they were governed by a European nation which alone was able to represent them in dealings with other European nations for the signature of treaties affecting them. The colonial powers recognized that the Indians had the capacity to sign treaties directly with the European nations occupying North American territory. The *sui generis* situation in which the Indians were placed had forced the European mother countries to acknowledge that they had sufficient autonomy for the valid creation of solemn agreements which were called "treaties", regardless of the strict meaning given to that word then and now by international law. *The question of the competence of the Hurons and of the French or the Canadians is essential to the question of whether a treaty exists. The question of capacity has to be examined from a fundamentally different viewpoint and in accordance with different principles for each of these groups*. Thus, I reject the argument that the legal nature of the document at issue must necessarily be interpreted in the same way as the capitulations of the French and the Canadians. The historical context which I have briefly reviewed even supports the proposition that both the British and the Hurons could have intended to enter into a treaty on September 5,1760. I rely, in particular, on Great Britain's stated wish to form alliances with as many Indians as possible and on the demoralizing effect for the French, the Canadians and their allies which would result from the loss of this long-standing Indian ally whose allegiance to the French cause had until then been very seldom shaken.[354]

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[354] *R. v. Sioui*, [1990] 1 SCR 1025 at 1056, Lamer J. Emphasis added.

A similar philosophy was expressed by McKeown J in the final case – *Mitchell* – where the question was whether certain international treaties – the Treaty of Utrecht (1713), the Jay Treaty (1794), and the Treaty of Ghent (1814) – in conjunction with a series of meetings or councils between the British Crown and First Nations held to explain those treaties, constituted "a source of recognition and protection of pre-existing rights, an independent source of treaty rights, a source of positive protection for . . . Aboriginal rights, a source of positive duties and obligations on the British Crown, and a constraint on the Crown in the nature of estoppel in international law."[355] McKeown J concluded that this amalgam of events did not amount to "treaty rights" under subsection 35(1) of the *Constitution Act, 1982*, at least in part because the Indians were not parties to the three international treaties nor were they involved in their negotiation, execution, or termination. The plaintiff Indians argued, however, that, although no First Nations had been involved in the negotiation of the international treaties, the *Vienna Convention on the Law of Treaties* provided that rights in favour of a third party – including, according to the plaintiffs, an Indian nation – will arise from a treaty if such was the intention of the parties. Moreover, the plaintiffs contended that such rights, once created, cannot be altered in any way without the consent of the third party if it is established that such was the intention of the parties to the treaty. To this submission McKeown J responded:

> Under the *Vienna Convention on the Law of Treaties*, a third party being referred to is a third State. Article 34 of the Convention reads:
>
> > A treaty does not create either obligations or rights for a third State without its consent.
>
> The plaintiff submitted that whether the Indian Nations were recognized as States is irrelevant, as formal requirements of statehood were not a necessary requirement of British treaty making in the mid-18th and 19th centuries. Formal requirements of statehood may not have been a necessary requirement, however, in my view, *the British Crown considered the First Nations to be British subjects and not independent nations or states. The capacity of First Nations to enter into treaties with European powers has long been recognized in Canada*, however, this does not change the requirement that states creating [a] treaty provision in favour of a third state must demonstrate the intention to do so. It follows, that the British Crown would have to have viewed the First Nations as independent nations or states.

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[355] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 104 (headnote) (FCTD).

> *I recognize that the First Nations were often referred to as "brothers", and that the plaintiff's experts testified that the First Nations were viewed as independent peoples, however, in my view, the conduct of the British Crown toward the First Nations during that period demonstrates that it did not view them as independent nations or states. . . .*[356]

The *Sioui* and *Mitchell* cases underscore the *sui generis* nature of the relationship between the Indians and the European nations occupying North American territory. The historical context dictated that, to permit binding treaty agreements to be entered into with the Indians, it was necessary for the Europeans to adapt the formal treaty-making requirements of international law to the circumstances of the Indians as the Europeans found them. Apparently, the British Crown did not view the Indians as nations or states, yet it was prepared to negotiate *sui generis* "treaties" with them. Using Justice Lamer's terminology, it seems evident that the British were prepared to treat the question of capacity in accordance with different principles for the Indians than for international treaty-making powers.

In this context, we find that the First Nation's argument regarding the circumstances surrounding the negotiation of Treaties 4, 6, and 7, and in particular with respect to the willingness of the Crown to negotiate in the absence of Chiefs and principal men, carries considerable weight. In previous inquiries we have observed the willingness of the Crown to deal with whatever representatives First Nations have been prepared to allow to speak on their behalf. We see no reason to conclude that, in the absence of their Chiefs, including Ogemawahj (assuming that he *was* absent), the Indians who assembled before Jarvis in 1837 could not have likewise chosen other representatives to bind them with respect to any obligations undertaken.

It is important to recognize, however, that the negotiations in this case were somewhat different from the discussions that may have occurred in more typical treaty negotiation situations. We accept that the common perception of negotiation is a process of give and take, with offers and counter-offers until the parties are prepared to agree on a mutually satisfactory compromise. That is not to say, however, that compromise is an essential element of negotiation. It is always open to one party to negotiate by ultimatum – that is, to state a single or final position that it is prepared to accept and to invite the other party to "take it or leave it." We see Jarvis's 1837 address as having very much this sort of character. Clearly, it was open to the Indians to respond in at least two ways: they could signal their refusal by returning to the United States, or they could accept by remaining in Canada. Presumably, they might also have responded by other means, such as proposing other terms or going to war but, as neither of these alternatives seems to have been pursued, they need not be discussed further. Subject to our comments regarding mutuality and intention, we see nothing in Jarvis's address to suggest a need for acceptance by designated representatives. Rather, the Crown intended that Jarvis's address would be acted upon, and that certain rights and obligations would flow from the decisions made by *individual* Indians.

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[356] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 183 (FCTD). Emphasis added.

In the Commission's report dealing with the treaty land entitlement claim of the Fort McKay First Nation, we referred to the decision of Mahoney J of the Federal Court, Trial Division, in *R. v. Blackfoot Band of Indians*.[357] Although he recognized that the Treaty 7 Indians were represented by Chiefs and councillors during their negotiations with the Crown's officers, Mahoney J emphasized that the aboriginal parties to the treaty were individual Indians:

> It is clear from the preamble that the intention was to make an agreement between Her Majesty and all Indian inhabitants of the particular geographic area, whether those Indians were members of the five bands or not. The chiefs and councillors of the five bands were represented and recognized as having authority to treat for all those individual Indians. *The treaty was made with Indians, not with bands. It was made with people, not organizations.*[358]

The Commission found further support for this conclusion in Justice Mahoney's analysis of the treaty's substantive provisions:

> It was Indians, not bands, who ceded the territory to Her Majesty and it was to Indians, not bands, that the ongoing right to hunt was extended. The cash settlement and treaty money were payable to individual Indians, not to bands. The reserves were

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[357] *R. v. Blackfoot Band of Indians*, [1982] 4 WWR 230, [1982] 3 CNLR 53 (FCTD).

[358] *R. v. Blackfoot Band of Indians*, [1982] 4 WWR 230, [1982] 3 CNLR 53 at 61 (FCTD). Emphasis added.

> established for bands, and the agricultural assistance envisaged band action, but its population determined the size of its reserve and the amount of assistance.[359]

We do not believe that it is necessary for us to determine whether the Crown must be considered to have dealt with individual Indians in all cases, or whether it was possible that in some cases it might be concluded that the Crown has treated with entire Indian nations. From the statements in the *Blackfoot Band* case, it can be seen that the Crown there considered itself to be dealing with individual Indians, notwithstanding that, depending on the circumstances, the Indians might have negotiated through representatives such as Chiefs, headmen, or others. Similarly, as we have seen, Baudouin JA of the Quebec Court of Appeal in *Côté* acknowledged that "the agreements signed between the French or English colonizers and particular aboriginal groups were, in most cases, agreements not between two governments of sovereign states but between a government and a nation or *a part of a nation*."[360]

In this light, we must conclude that, at least in some cases, it was individual Indians and their descendants who became bound, not their representatives in the negotiations and not organizational units such as clans, clan segments, villages, bands, or nations. Treaties with the Indians, being *sui generis*, are not necessarily negotiated on a nation-to-nation basis as Canada suggests, and on the facts of this case we are inclined to believe that the Crown intended that its offer might be accepted by some members of a clan, village, or nation and rejected by others. There is nothing in the evidence to indicate that the offer was an "all or nothing" proposition requiring an entire nation to decide to locate in either Canada or the United States. Indeed, the Crown anticipated considerable cost savings based on the expectation that, even if significant numbers of Indians initially moved to Canada, few would stay.

Finally, as Canada states in its submission, "the promises were made to all Indians who had served as British allies."[361] Therefore, although no document has been put forward naming the representatives of each nation in attendance at the 1837 council, such a link would seem unnecessary given that the promises were admittedly intended to apply to all Indian allies, including the Pottawatomi. Although the persons in attendance at the 1837 address may or may not have been the direct ancestors of the Moose Deer Point First Nation, those in attendance at the 1836 council likely were, as Canada has admitted.[362] Canada has also accepted as accurate the conclusion of Joan Holmes and Associates in 1994 that the Indians currently residing at Moose Deer Point have descended from Chief Ogemawahj and the other Pottawatomi who migrated to Canada in the 1830s or 1840s.[363]

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[359] *R. v. Blackfoot Band of Indians*, [1982] 4 WWR 230, [1982] 3 CNLR 53 at 61 (FCTD). Paragraph references omitted.

[360] *R. v. Côté* (1993), 107 DLR (4th) 28 at 46 (Que. CA), Baudouin JA. Emphasis added.

[361] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 46.

We agree with the First Nation's submission that the Crown intended the promises made by Jarvis in 1837 to be widely disseminated. Therefore, we conclude, based on the reasons of the Supreme Court of Canada in *Simon*, that the Moose Deer Point First Nation has established not only capacity but a sufficient connection with the Pottawatomi in attendance in 1837 to be able to claim the benefit of any promises made that might be considered treaty promises. In *Simon*, Dickson CJ stated:

> The Micmac signatories were described as inhabiting the eastern coast of Nova Scotia. The appellant admitted at trial that he was a registered Indian under the Indian Act and was an "adult member of the Shubenacadie Indian Brook Band of Micmac Indians and was a member of the Shubenacadie Band Number 02". . . . This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the Treaty. *True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.*[364]

We consider that this analysis applies with equal weight to the circumstances of the present inquiry. Given that the Crown's 1837 address was directed to all Indian allies in the United States, we believe that the connection between the address and the allies – even those who were not in attendance – was sufficient.

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[362] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 31.

[363] Joan Holmes & Associates, Inc., "Moose Deer Point I.R. No. 79 Report," October 1994 (ICC Exhibit 2, p. 15); Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 30-31.

[364] *Simon v. The Queen*, [1985] 2 SCR 387 at 407-08. Emphasis added.

We turn now to the three tests posed by Lamer J in *Sioui* to determine the existence of a treaty: "the intention to create obligations, the presence of mutually binding obligations, and a certain measure of solemnity." We will consider the last of these tests first.

Solemnity

The Moose Deer Point First Nation submits that there was sufficient solemnity and formality in Jarvis's address to support a conclusion that the Crown and the Indians in fact entered into a treaty:

> It was the intention of the Crown that the U.S. native allies should understand the address as a formal undertaking. It was customary to deliver wampum belts, medals and flags to denote important undertakings. In 1836, Lieutenant-Governor Bond Head explained in detail his understanding of the practice of signifying solemn promises by delivering wampum belts and the importance attached to these formalities by the tribes. In 1837, the Chief Superintendent [Jarvis] specifically announced to those present at Manitoulin Island that a silk flag was being given to them by Lieutenant-Governor Bond Head as a token of the declaration made. The flag was flying at Manitoulin Island in 1837 and was delivered to the Odawa tribe then residing on the island "who came forward and received it with great ceremony."[365]

Counsel argues that the Indians regarded the address as the "word of the white man" – a formal undertaking to be accepted or rejected.[366] In the First Nation's view, the honour and good faith of the Crown required it to provide refuge and assistance to Indians displaced from their lands in the United States who had been allies of the Crown for decades.[367]

Canada does not deny that the 1837 address was a solemn occasion, but argues that solemnity can equally be present at meetings *not* involving treaties, as at treaty councils. For example, in *Mitchell*, the Indian plaintiffs argued that the five councils held to explain the impact of the Treaty of Utrecht, the Jay Treaty, and the Treaty of Ghent should, in and of themselves, constitute a treaty with the Indians. In concluding that the councils did not amount to a treaty, McKeown J commented:

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[365] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 66-67.

[366] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 67, 69.

[367] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 69.

> I accept the plaintiff's evidence describing the protocol followed at these meetings and I accept that this protocol is consistent with that used by First Nations in treaty councils, however, the plaintiff's witnesses also stated that the protocol was often followed in meetings that did not involve treaties.
>
> The Crown representatives would have been viewed by the First Nations present at these meetings as authorized to speak for the Crown and the First Nations had the capacity to enter into treaties, however, the evidence does not support an intention on the part of the Crown to create a treaty with the Mohawks of Akwesasne, nor does the evidence demonstrate an exchange of promises by the parties.[368]

Clearly, McKeown J was alive to all the tests developed by the Supreme Court of Canada in *Sioui*, including capacity, solemnity, mutuality, and intention. However, although he was prepared to find the required capacity and solemnity to support the existence of treaty, he found that, in the circumstances of that case, the parties did not intend to enter into a treaty or exchange mutual promises. In the result, the Indians' claim failed.

Canada also argues that, to date, no court has held a purely oral arrangement to be a treaty, and that oral promises may at most give rise to an enforceable contract or agreement.[369] Although counsel acknowledges that the lack of a written document in this case may not be fatal to the First Nation's claim – and indeed that the Quebec Court of Appeal in *Côté* decided that an oral arrangement for which there was no written record could serve as a treaty – the failure to reduce the agreement to writing might indicate that the parties did not intend to formalize their relationship as a treaty.[370]

In response to these submissions, the First Nation contends that the Crown's treaties with its native allies before 1837 "were all completed orally with the expectation that the tribes would confirm the arrangements with their actions, that is, by giving military support to the Crown as needed."[371] Furthermore, the First Nation notes that requiring a treaty to be documented would be inappropriate given, first, Lieutenant Governor Head's explanation in 1836 of the formalities attending the making of solemn engagements between the Crown and the Indians, and, second, the indications that the councils of that year and 1837 featured such formalities.[372] The fact that there was no document does not mean, in the First Nation's submission, that the Crown's dealings with the Indians should be considered any less effective as a treaty, particularly in light of the following statement by Norris JA in *White and Bob* as quoted by Lamer J in *Sioui*:

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[368] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 184 (FCTD).

[369] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 43-44.

[370] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 44.

> In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law. . . . *The nature of the transaction itself was consistent with the informality of frontier days in this Province and such as the necessities of the occasion and the customs and illiteracy of the Indians demanded.*[373]

Looking first at the question of whether a treaty can be found to exist in the complete absence of a written treaty document, we turn to cases that offer guidance. For example, in *R. v. Jones and Nadjiwon*,[374] the court found that certain oral promises made by Lieutenant Governor Head to the Saugeen people at the 1836 Manitoulin council formed part of Treaty 45½, even though those promises, which related to fishing, were not recorded in the treaty text.[375] The case might be distinguished on the basis that there actually was a written component to the treaty, but we consider it significant that, despite the silence of the treaty on the fishing issue, the court upheld the oral promises on the basis that they reflected the understanding and intention of the parties at the time of treaty.

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[371] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 70.

[372] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 13-14.

[373] *R. v. White and Bob* (1964), 50 DLR (2d) 613 at 649 (BCCA), Norris JA, affirmed (1965), 52 DLR (2d) 481 (SCC); *R. v. Sioui*, [1990] 1 SCR 1025 at 1044, Lamer J. Emphasis added.

[374] *R. v. Jones and Nadjiwon* (1993), 14 OR (3d) 421.

[375] These promises were referred to in a dispatch from Head to London, but not mentioned in the treaty text itself: *R. v. Jones and Nadjiwon* (1993), 14 OR (3d) 421 at 437 and 439.

The courts have repeatedly referred to the *sui generis* nature of treaties, and the unique circumstances that surround them, at times implying that an oral agreement might well constitute a treaty. For example, the Supreme Court of Canada, when reviewing the various principles of treaty interpretation in *R. v. Badger*,[376] implied through the disjunctive use of "treaty" and "document" that a treaty can be something other than a document, and that the real issue to be determined by the Court is whether solemn promises were exchanged. Remarking that "a treaty represents an exchange of solemn promises between the Crown and the various Indian nations," and is therefore "sacred" in nature, Cory J (La Forest, L'Heureux-Dubé, Gonthier, and Iacobucci JJ concurring) reasoned that "any ambiguities or doubtful expressions in the wording of the treaty *or document* must be resolved in favour of the Indians.[377]

Perhaps more significant, Cory J added that "*treaties*, as written documents, *recorded an agreement that had already been reached orally* and they did not always record the full extent of the oral agreement."[378] In a separate concurring judgment, Sopinka J (Lamer CJ concurring) stated:

> [T]he principles . . . [of treaty interpretation] arise out of the nature of the relationship between the Crown and aboriginal peoples with the result that *whatever the document in which that relationship has been articulated*, the principles should apply to the interpretation of that document.[379]

In other words, the principles of treaty interpretation will apply to any document articulating the relationship between the Crown and Indian peoples. Based on Justice Cory's words, the agreement exists *before* being recorded in written form; presumably, such an agreement, once formed, can

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[376] *R. v. Badger*, [1996] 1 SCR 771.

[377] *R. v. Badger*, [1996] 1 SCR 771 at 793-94, Cory J. Emphasis added.

[378] *R. v. Badger*, [1996] 1 SCR 771 at 798, Cory J. Emphasis added.

[379] *R. v. Badger*, [1996] 1 SCR 771 at 782, Sopinka J. Emphasis added.

continue to exist even if the parties fail in whole or in part to reduce it to writing, but instead record some or all of it by other means such as wampum or perhaps the collective memories of the parties. If, in fact, the defining feature of a treaty is the *substance of the relationship* between the Crown and aboriginal peoples, rather than the *nature of the medium* in which that relationship is articulated, then, provided the requisite conditions of treaty making are met, there would seem to be nothing to preclude any instrument that records that relationship from being properly construed as a treaty, whatever form that instrument may take.

By way of illustration, in *Sioui,* a dispatch of September 5, 1760, issued unilaterally and signed only by the adjunct to General Murray, giving orders to British soldiers to guarantee safe passage to the Hurons on their journey home to Lorette, was determined by the Supreme Court of Canada to constitute a treaty. The document was an administrative order to the British soldiers. It had not been assented to by the Hurons, and did not bear their signatures or totem marks, nor did it reflect a mutual exchange of promises. The Court nonetheless held that the transaction recorded therein constituted a treaty. The reference by Lamer J to the transaction as being of greater importance than the document in which it was recorded is noteworthy:

> [T]he courts should show flexibility in determining the legal nature of a document *recording a transaction with the Indians.* In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration.[380]

Despite the Crown's argument in *Sioui* that the document was not a treaty, the Court held that the dispatch reflected the result of negotiations between the parties. It was therefore not a unilateral act, but the "embodiment of an agreement reached between the representative of the British Crown and the representatives of the Indian Nations present."[381]

In *R. v. Vincent,*[382] the Ontario Court of Appeal considered the question of whether the Jay Treaty was a treaty within the meaning of subsection 35(1) of the *Constitution Act, 1982*. The Court found that no historical fact satisfying the criteria laid out in *Sioui* had been placed in evidence. However, in making this finding, the court referred specifically to a lack of evidence supporting either a written *or an oral* treaty,[383] again suggesting that an oral agreement might itself constitute a treaty.

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[380] *R. v. Sioui*, [1990] 1 SCR 1025 at 1035. Emphasis added.

[381] *R. v. Sioui*, [1990] 1 SCR 1025 at 1057.

[382] *R. v. Vincent* (1993), 12 OR (3d) 427, leave to appeal to SCC refused.

Perhaps the most significant case on this point is *Côté*, in which, as we have already seen, Baudouin JA stated:

> Concerning the proof of such treaties, the situation in aboriginal law is different from what we usually encounter. *In the first place, a number of these agreements were not always reduced to writing and, in many cases, the common aboriginal custom was to acknowledge their existence through a mere exchange of wampum and to commit them to the collective memory*. Furthermore, the colonizer was in most cases in a position of superiority, if only because the legal concepts used were in some cases unknown to the aboriginal people or hard to understand or grasp in their cultures. That is why the Supreme Court has established some exceptional but nevertheless precise rules in such matters, rules that are binding on the lower courts.
>
> The first such rule is that *any agreement made in principle be considered to be a true treaty even if it does not have the form of one*, notwithstanding some reluctance on the part of some lower courts: see *Delgamuukw v. British Columbia, supra*. *Thus any pact, alliance, agreement or arrangement may constitute a treaty* within the meaning of s. 88 of the *Indian Act*: *R. v. Simon, supra*; *R. v. Sioui, supra*, at p. 441 *et seq*. As Lamer J. wrote, in *Sioui* (at p. 441): ". . . what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.". . .
>
> The second such rule is that *it is sometimes necessary, in the absence of a written text acknowledging the agreement, to be content with secondary evidence, of lesser quality*, hearsay evidence, and thus to derogate consciously from the ordinary rules.[384]

As we have already stated, Canada acknowledges that *Côté* establishes that a treaty may be found to exist even in the absence of a written record. In light of this concession and the foregoing authorities, the Commission feels confident in concluding that the absence of a written treaty document does not lead to the inescapable conclusion that a treaty does not exist. We note Canada's point that the absence of a document may indicate that the parties did not *intend* to enter into a treaty, and we will address that issue shortly.

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[383] *R. v. Vincent* (1993), 12 OR (3d) 427 at 443.

[384] *R. v. Côté* (1993), 107 DLR (4th) 28 at 46-47 (Que. CA), Baudouin JA. Emphasis added.

On the question of solemnity, the formality of the 1837 address by Jarvis is well documented in Anna Jameson's first-hand account of the event, which she described as the "Grand Council."[385] The Commission also notes that the solemnity of the councils in both 1836 and 1837, as well as similar councils over the preceding 50 years, has already been admitted by Canada:

> A review of Bond Head's despatch and of the historical context would lead one to believe that the parties intended the promises to be acted upon. *The promises were made by senior British officials and appear to have been made at formal councils with the Indians, who recorded the existence of the promises by the use of Wampums.* Britain required the assistance of the Indians in order to protect Upper Canada from American hostilities. The Indians relied on British promises of protection after the wars had ended.[386]

It will be recalled that Head's 1836 dispatch referred to by Canada in this passage described the Indians' view of the strength of the obligations created by oral pledges secured by the delivery of wampums:

> An Indian's word when it is formally pledged, is one of the strongest moral securities on earth, like the rainbow it beams unbroken when all beneath is threatened with annihilation.
>
> The most solemn form in which an Indian pledges his word, is by the delivery of a Wampum belt of Shells, and when the purport of this symbol is once declared, it is remembered and handed down from father to son, with an accuracy and retention of meaning which is quite extraordinary.
>
> Whenever the belt is produced, every minute circumstance which attended its delivery seems instantly to be brought to life, and such is the singular effect produced on the Indian's mind by this talisman, that it is common for him, whom we term "the Savage" to shed tears at the sight of a Wampum which has accompanied a message from his friend.[387]

Although Canada proceeds to argue that the overall historical context leads to a conclusion that the promises were not intended to constitute a treaty, it again bases that submission on intent and not on a lack of solemnity. As we stated above, we will come to the issue of intent later in this report. For now, it is safe to conclude that both parties appear to recognize that the promises were couched in that "certain measure of solemnity" required to satisfy the test identified by Lamer J in *Sioui*.

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[385] Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20).

[386] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 48. Emphasis added.

[387] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 13).

We turn now to another of those tests – the presence of mutually binding obligations.

Mutuality

Canada argues that the events of 1837 did not give rise to a treaty because there is no evidence of *negotiations* or an *exchange of promises* between the Crown and the Indians that would result in each party acquiring the benefits – and assuming the obligations – inherent in treaty making. Rather, according to Canada, Jarvis's address was simply a unilateral announcement of the end of presents to Indians residing in the United States;[388] the Indians were "clearly and officially informed" of a change in policy, and there were no negotiations that might have signalled a mutual exchange of promises.[389]

Canada further submits that Britain's relations with the United States had been largely peaceful for the 25 years preceding Jarvis's address, and therefore the need for Britain to "cultivate" good relations with its native allies had become largely unnecessary by 1837. Indeed, American expansion to the west, coupled with that country's Indian removal legislation, led to growing pressure from the United States on Britain to end its practice of giving presents to Indians who might use those resources to oppose American policy. According to counsel for Canada, by 1837 circumstances had changed: while Britain was no longer looking for anything from its native allies south of the border, the Indians were in desperate need of asylum.[390] In Canada's submission, all the benefits were flowing one way – from the Crown to the Indians[391] – and, that being the case, the 1837 council thus lacked the necessary *quid pro quo* from the Indians to satisfy the treaty requirement for mutually binding obligations as set forth in *Simon*, *Sioui*, and *Mitchell*.[392]

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[388] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 9.

[389] ICC Transcript, April 8, 1998, pp. 134-35 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 7.

[390] Reply Submission on Behalf of the Government of Canada, April 1, 1998, pp. 10-11; ICC Transcript, April 8, 1998, p. 141 (Perry Robinson).

[391] ICC Transcript, April 8, 1998, p. 136 (Perry Robinson).

In reply, the First Nation contends that, in return for the promises made to the Indians, the consideration flowing to the Crown was "greater security in its relations with the United States" which, as a "matter of state," was of considerable significance to Britain.[393] The American Indians also acted to their detriment by giving up their land surrender payments in the United States to move north[394] in reliance on these promises, preferring the "known certainty" of presents to the perceived uncertainty of the payments from the American government.[395] Moreover, the First Nation argues that the enlistment of Indian support – likely including Ogemawahj, according to pay records – to quell the rebellion of 1837 demonstrates that the Indians' military services were still required and constituted yet another form of consideration.[396] In any event, although there may not have been the sort of negotiations that might normally exist in treaty making, the First Nation submits that such a lack of negotiation was typical of Indian treaties in those days, when the Crown's representatives often arrived with the treaty text already in hand.[397] In counsel's view, there was clearly an offer to be accepted or rejected with the intention that any resulting agreement would form the basis for a long-term relationship, and it was open to the Indians to "vote with their feet" by either moving to Canada or remaining in the United States.[398]

In the Commission's view, Canada's contention that there was no mutuality in the 1837 council is without merit. We have already stated why we consider that negotiations took place, albeit by ultimatum, and we also consider that there was a mutual exchange of consideration. This is amply demonstrated in the continuing readiness of Britain's Indian allies to act in defence of Canada, as illustrated by their response to the Rebellion in late 1837 and 1838. The threat of the American presence to British North America was still clearly evident, notwithstanding Canada's urgings – with the benefit of considerable hindsight – to the contrary. It seems apparent that the Indians still considered themselves honour-bound to uphold their end of the longstanding arrangement to provide military services in exchange for presents. There may have been ongoing commercial relations between the Indians and the Crown as well, although the evidence before the Commission on this point is sketchy. Nevertheless, the availability of the Indians to take up arms against invaders is sufficient in and of itself to constitute the necessary *quid pro quo* required to support the existence of a treaty in this case.

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[392] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 9.

[393] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 68; ICC Transcript, April 8, 1998, pp. 86-87 (Gary Nelson).

[394] ICC Transcript, April 8, 1998, pp. 88 and 93 (Gary Nelson).

[395] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 69; ICC Transcript, April 8, 1998, pp. 56-57, 88 (Gary Nelson).

[396] ICC Transcript, April 8, 1998, pp. 72-73, 194 (Gary Nelson).

[397] ICC Transcript, April 8, 1998, pp. 185-86 (Gary Nelson).

[398] ICC Transcript, April 8, 1998, pp. 85, 186-87 (Gary Nelson).

In addition, however, there was at least one other form of consideration arising out of the 1837 council and flowing from the Indians to the Crown. To understand this point, it is important that the 1837 council be assessed in the proper light.

Canada has emphasized that the mutuality aspect of the claim must be considered in its historical context, and suggests that, as a result of changing circumstances, Britain no longer required the Indians' services as military allies. In light of the 1837 rebellion, we do not consider this to be true. What is more important, however, is that it was often changing circumstances that actually *gave rise* to many treaties.

In western Canada, for example, as the Commission has seen in earlier inquiries, the changing circumstances included the arrival of settlers and the discovery of gold, and these circumstances caused the Crown to enter into treaties with the Indians to *confirm* or *change* the nature of their relationship. The Indians generally had something the Crown wanted, and in most cases it was land. In some cases, however, the object of the Crown's desire was something else; as Lamer J stated in *Sioui*, "[t]here is no reason why an agreement concerning something other than a territory, such as an agreement about political or social rights, cannot be a treaty within the meaning of s. 88 of the *Indian Act*."[399]

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[399] *R. v. Sioui*, [1990] 1 SCR 1025 at 1043.

In the case of Britain's Indian allies residing in the United States, what they had was not land but something they had been receiving from the Crown for over 70 years – presents. As anthropologist James Clifton has written:

> Presents were needed to encourage the start of an alliance with newly contacted tribes, to sustain relationships with established allies, to meet the competition from rival powers, and to woo away the allies of the enemy. They were employed to lure warriors from their hunting grounds in preparation for battle, to forestall later desertions, to celebrate and reward victories, to console survivors for their wounds and casualties and to formalize peace councils.[400]

It is easy to envision the British providing presents to their Indian allies for more than one, if not all, of these reasons. Presents were an integral part of British policy during its wars with France in North America prior to the latter's defeat in 1760, and the French themselves had given presents for many years before that. Britain continued the practice with the extension of the Covenant Chain and the delivery of the wampum belt by Sir William Johnson at Niagara in 1763, the renewal of these pledges by his son, Sir John Johnson, in 1786, and the reaffirmation of the promises by Robert Dickson during the War of 1812. The councils in 1836 and 1837 involving Lieutenant Governor Head and Chief Superintendent Jarvis were merely the latest in a long line of dealings between Britain and the Indians on the question of presents. By that time, Britain's view of its *existing* obligations regarding presents was clearly set forth in Head's dispatch in 1836, in which he discussed the earlier ceremonies involving the Johnsons and Dickson:

> These rude ceremonies had probably little effect upon our officers, but they sunk [sic] deep in the minds of the Indians. The Wampums thus given, have been preserved and are now entrusted to the keeping of the great Orator, Liginish, who was present at the Council I attended on the Manitoulin Island in Lake Huron, and in every sense, these hieroglyphics are moral affidavits of the bygone transactions to which they relate. On our part, little or nothing documentary exists – the promises which were made, whatever they might have been, were almost invariably verbal, those who expressed them are now mouldering in their graves. However, the regular delivery of the presents, proves and corroborates the testimony of the Wampums, and

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[400] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 13).

> by whatever sophistry we might deceive ourselves, we could never succeed in explaining to the Indians of the United States, that their Great Father was justified in deserting them. . . .
>
> . . . I am of opinion that to the visiting Indians of the United States we cannot without a breach of faith, directly refuse to continue the presents, which by the word of our generals we have promised, and which by long custom we have sanctioned.[401]

It can be seen that, in this historical context, the purpose of the councils of 1836 and 1837 was not for Britain to *promise* presents to its Indian allies, but to *withdraw* presents, at least to those of its allies who remained in the United States. In the Commission's view, the primary consideration in this case was flowing *from* the Indians *to* the Crown, and not, as Canada contends, the other way around. There were other considerations flowing from Britain to the Indians, and we will consider those later in this report. For the time being, it is sufficient to conclude that the councils of 1836 and 1837 imposed mutually binding obligations on both the Crown and the Indians.

We will now consider the intention of the parties to create obligations – the final test established by Lamer J in *Sioui*.

Intention

Before considering the parties' positions on the intention of the Crown and the assembled Indians in 1837 to create mutually binding obligations, it is instructive to review the relevant case law bearing on this issue. In *Sioui*, after noting "the importance of the historical context, including the interpersonal relations of those involved at the time, in trying to determine whether a document falls into the category of a treaty," Lamer J continued:

> The decision of the Ontario Court of Appeal in *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227, also provides valuable assistance by listing a series of factors which are relevant to analysis of the historical background. In that case the Court had to interpret a treaty, and not determine the legal nature of a document, but *the factors mentioned may be just as useful in determining the existence of a treaty as in interpreting it. In particular, they assist in determining the intent of the parties to enter into a treaty*. Among these factors are:

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[401] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 14-15).

> 1. continuous exercise of a right in the past and at present,
> 2. the reasons why the Crown made a commitment,
> 3. the situation prevailing at the time the document was signed,
> 4. evidence of relations of mutual respect and esteem between the negotiators, and
> 5. the subsequent conduct of the parties. . . .[402]

Later in the same judgment, Lamer J commented on the approach to be taken by a court in determining the parties' intentions:

> Even a generous interpretation of the document . . . must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.[403]

In *Marshall*, the Nova Scotia Court of Appeal restated the approach this way:

> Lamer J. confirms that the goal is to deduce the common intention of the parties by interpreting the treaties in their historical context. . . .
>
> In ascertaining the common intention the court must take into consideration the context in which treaties were negotiated and committed to writing, including the limitations of the parties. The resulting interpretation must, however, be a realistic one.[404]

Canada submits that the council of 1837 did not amount to a treaty because the parties did not intend it to be one. Counsel argues that the sole purpose of Jarvis's address was to announce unilaterally Britain's policy decision to cease providing presents to native allies residing in the United States, and that this intent is evident in Head's subsequent report stating that "the Indians have been clearly and officially informed that at the Expiration of Two Years Presents will no longer be delivered to Indians residing out of the Dominions of Her Britannic Majesty."[405] Although Britain had previously required the Indians' assistance to defeat the French and to protect Upper Canada from the Americans, by 1837, according to counsel, Britain had entered a period of fiscal restraint in which, to reduce its financial commitments, it would have sought to avoid entering into treaties guaranteeing rights in perpetuity.[406] Indeed, in the same report, Head informed Lord Glenelg that, "[w]ith respect to the Reductions which have been ordered by your Lordship to be made in the Indian Department," he had terminated the services of four Crown employees.[407] In Canada's submission, the fact that the Crown sought to reduce or eliminate presents was a measure of the diminished esteem and respect with which Britain regarded its Indian allies by 1837.[408]

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[402] *R. v. Sioui*, [1990] 1 SCR 1025 at 1045. Emphasis added.

[403] *R. v. Sioui*, [1990] 1 SCR 1025 at 1069.

[404] *R. v. Marshall* (1997), 146 DLR (4th) 257 at 265-66 (NSCA).

Other indications that the Crown did not intend to enter into treaty, counsel argues, were the lack of a treaty document[409] and the seeming lack of concern on the part of Britain's representatives to ensure that Chiefs and others with representative capacity were there to act on the Indians' behalf.[410] In Canada's view, the 1837 council paralleled the conferences in *Mitchell v. Minister of National Revenue* which, despite certain protocols being observed, were not, according to McKeown J, treaty-making councils, in part because the parties did not intend them to be.[411] Counsel submits that, if the Crown had intended to enter into a treaty, it would have been more specific in dealing with issues such as the timing for providing reserve land, as well as reserve size and location.[412]

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[405] ICC Transcript, April 8, 1998, p. 122 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 13; Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, p. 154).

[406] ICC Transcript, April 8, 1998, pp. 141-43 (Perry Robinson).

[407] Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, p. 154).

[408] ICC Transcript, April 8, 1998, pp. 144, 146-47 (Perry Robinson).

[409] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 44.

[410] ICC Transcript, April 8, 1998, p. 129 (Perry Robinson).

[411] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 47.

[412] ICC Transcript, April 8, 1998, p. 174 (Perry Robinson).

Counsel further points to the statements by Indian Superintendent T.G. Anderson, upon announcing the schedule for terminating all presents commencing in 1852, as evidence that presents had simply been temporary in nature and were not intended to be permanent.[413] In Canada's view, the promises of 1837 "were merely one aspect of the historic relationship between the Crown and aboriginal people," which *at most* gave rise to "an enforceable agreement or contract" but not a treaty.[414] The significance of the characterization of the 1837 council as an agreement, argues counsel, is that an agreement is not protected under subsection 35(1) of the *Constitution Act, 1982*, and can be terminated on reasonable notice, as Anderson did in 1852. However, it is important to be clear that, in Canada's view, the 1837 council was insufficient to constitute either a treaty or an agreement.[415]

Not surprisingly, the First Nation emphatically opposes this conclusion. In its view, although obligations need not be perpetual for a valid treaty to be created,[416] the 1837 address was intended by both parties to set forth the basis for a long-term relationship.[417] The address represented "an open invitation to the U.S. native allies to settle permanently within British dominions,"[418] and the clear, consistent promises of Sir William Johnson in 1763, Sir John Johnson in 1786, Robert Dickson in 1813, and S.P. Jarvis in 1837 leave no doubt, according to the First Nation, that "the Crown formally promised the allies perpetual assistance."[419] It was in reliance on these promises that "[m]any thousands of the Crown's allies migrated [and] settled in Her Majesty's dominions," preferring the "known certainty" of presents from the Crown to land-surrender payments in the United States.[420]

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[413] ICC Transcript, April 8, 1998, p. 159 (Perry Robinson).

[414] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 43.

[415] ICC Transcript, April 8, 1998, pp. 120, 174-75 (Perry Robinson).

[416] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 17.

[417] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 67.

[418] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 67.

[419] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 17-21.

[420] Written Submission on Behalf of the Moose Deer Point First Nation, April 1, 1997, p. 69; ICC Transcript, April 8, 1998, pp. 56-57 and 88 (Gary Nelson).

The First Nation submits that this reliance was later demonstrated by Ogemawahj's objection in 1852 to the termination of presents, "our Great Father . . . [having] said he would continue to give us Presents as long as the sun should appear in the sky."[421]

Relying on Clifton's analysis, Canada suggests that the First Nation is inaccurate in its argument that the Indians migrated in reliance on the promises of 1837 alone:

> A variety of factors entered into the choice of Canada as a preferred destination when it came time for the Potawatomi to move from their homeland: the old alliance with Britain, the anticipation of receiving a continuing supply of needed goods, antipathy to the United States, the welcome offered at Penetang, a preference for the Great Lakes environment, anticipation of greater respect for their culture and customs, the possibility of being awarded new lands, and others still unknown.[422]

Canada also suggests that the Pottawatomi had a natural propensity for, and were well adapted to, migration, and that "the main reason the Pottawatomi migrated to Upper Canada was because of the American government's implementation of its policy to forcibly move the Indians west."[423]

In response to these arguments, the First Nation submits that it is no answer to say that the promises of 1837 were only one of many factors giving rise to the migration of the Crown's native allies. Rather, all the factors listed by Canada were known at the time and formed the context within which the promises were made, and those who fulfilled the condition of those promises by settling permanently in Canada "are entitled to expect the Crown to fulfill its promises."[424]

As to Canada's submission that the Crown's respect and esteem for the Indians had waned by 1837, the First Nation argues that the evidence suggests the contrary: the entire reason for Jarvis's address was to honour the Crown's obligations to its allies.[425] In support of this conclusion, counsel points to Head's statement in 1836 that "to the visiting Indians of the United States we cannot without a breach of faith, directly refuse to continue the presents, which by the word of our generals we have promised, and which by long custom we have sanctioned."[426] In contrast, Anderson's reference in 1852 to presents as a form of charity did not accurately characterize the promises made in 1837, but instead merely illustrated the Crown's breach of those promises.[427]

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[421] "Address of T.G. Anderson, Superintendent of Indian affairs to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268 (ICC Exhibit 22, p. 163980).

[422] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 100); Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 52-53.

[423] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 53.

[424] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 22.

In response to Canada's suggestion that the promises constituted a contract rather than a treaty, and were thus terminable on reasonable notice, the First Nation argues that "contracts are terminable by agreement, and anything else is breach";[428] alternatively, if the promises gave rise to a treaty, "the treaty rights of the U.S. native allies cannot be extinguished without the consent of the Indians concerned."[429] In making the latter statement, the First Nation relies on the following excerpt from *Sioui*:

> It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred: *Simon*, *supra*, at p. 410, and *White and Bob*, *supra*, at p. 649. The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary consent to its extinguishment.[430]

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[425] ICC Transcript, April 8, 1998, p. 190 (Gary Nelson).

[426] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, pp. 14-15); ICC Transcript, April 8, 1998, p. 190 (Gary Nelson).

[427] ICC Transcript, April 8, 1998, p. 197 (Gary Nelson).

[428] ICC Transcript, April 8, 1998, p. 184 (Gary Nelson).

[429] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 84.

[430] *R. v. Sioui*, [1990] 1 SCR 1025 at 1063.

Ultimately, in the First Nation's submission, there is no significance to characterizing the 1837 promises as a contract rather than a treaty because the Specific Claims Policy, as set forth in *Outstanding Business*, states that Canada will recognize any claim disclosing a lawful obligation arising from "non-fulfillment of a treaty or agreement between Indians and the Crown."[431]

Finally, the First Nation contends that Canada's reliance on *Mitchell v. Minister of National Revenue* is misplaced. The five meetings or councils between Britain and the Indians in that case can be distinguished from the 1837 council since they were simply convened "to explain the contents of the Jay Treaty and the Treaty of Ghent to the First Nations";[432] in other words, "meetings to discuss treaties do not create a treaty."[433] The implication is that the conferences in *Mitchell* were not intended to give rise to treaties, whereas the 1837 council in this case featured the required intention to create mutually binding obligations.

The Commission agrees with Moose Deer Point that the *Mitchell* case is distinguishable. The present case involves neither an international treaty nor a council to explain a treaty among European nations, negotiated in the absence of First Nation representatives. Instead, it was a council at which the Crown's representative met with a large assembly of representatives from a variety of First Nations, including the Pottawatomi, to make a formal declaration upon which both the British and the Indians intended to rely.

Having regard for the five factors set forth in *Taylor and Williams* and adopted by Lamer J in *Sioui* for determining whether a treaty exists, we conclude that the parties intended to enter solemn engagements creating binding obligations. We have already seen that, by 1837, Britain was interested in reducing its expenditures on presents. It was thus prepared to make certain promises to its native allies in the United States in the expectation that, although initially a large number of Indians might migrate to Canada to receive the benefit of these promises, few would remain permanently, meaning that the Crown's overall financial commitment would likely be reduced. We will turn to the substance of those promises in the following section of this report, but it is safe to say at this point that at least one aspect of those promises – the future residence in Canada of those Indians entitled to continue receiving presents – was intended to be settled permanently. The Indians understood that the Crown intended to be bound by its promises, and, in large part in reliance on those promises, many did migrate to Canada – and, to Britain's surprise, large numbers of them stayed. When Jarvis delivered his address on August 4, 1837, 432 Pottawatomi from "Millwackie" were already situated at Manitowaning, where some were already clearing land for spring crops, and a further 218 had settled at Saugeen.[434] Within months, there were at least 1000 Pottawatomi in Upper Canada and, by mid-century, despite reports by Indian Affairs that the Pottawatomi numbered only a few hundred, there were actually several thousand.[435] It seems apparent that the Crown's decision to stop distributing presents to Indian allies who remained in the United States, and its promise of protection at a time when the Americans were forcibly moving Indians west of the Mississippi River, resulted in several thousand Pottawatomi relocating to Upper Canada within a relatively short period of time.

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[431] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 1; ICC Transcript, April 8, 1998, pp. 8-9; DIAND, *Outstanding Business*, 20.

[432] *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 at 184.

[433] ICC Transcript, April 8, 1998, p. 186 (Gary Nelson).

Finally, as counsel for the First Nation contends, there is evidence of mutual respect and esteem between the Crown and the Indians in the dealings of 1837. Just one year earlier, Head recognized that the failure to continue to deliver presents would be viewed as a breach of faith and a blow to the honour of the Crown in its dealings with the allies who had served it so well, while the Indians considered the promises to be "the word of the white man" and thus a solemn engagement. In this context, the Indians' understanding of the transaction must be carefully considered. As Cory J stated in *Badger*:

> [I]t is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted.[436]

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[434] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 68).

[435] Clifton, *A Place of Refuge* (ICC Exhibit 13, p. 68).

[436] *R. v. Badger*, [1996] 1 SCR 771 at 799, Cory J.

Cory J further underscored the importance of construing the transaction in a way that does not undermine the promises made by the Crown to the Indians:

> [T]he honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.[437]

The Commission has already concluded that it is not necessary to find that the Crown and the Indians in a given case intended to enter into a *treaty*, but merely that they intended to enter solemn engagements creating binding obligations. In our opinion, in this case they did just that. We disagree with Canada's submission that the address by Jarvis amounted to a mere announcement of British policy that the Crown was free to change or abolish. Given the formality of the 1837 council, the ceremonial delivery of a silk British flag to the Indians, the presence of high-ranking officials of the Crown, the large assembly of Indians and principal Chiefs, and the reference to a "formal" announcement, the evidence supports the conclusion that the Indians would have viewed the council as giving rise to binding treaty obligations between themselves and Britain.

What now remains to be determined is the substance of those obligations, and whether the Crown fulfilled them. It is to those questions that we now turn.

The Substance of the Promises

In considering the substance of the promises made by Britain to the Indians in 1837, it is once again important to start by reviewing the relevant legal principles established by the courts to guide us in this process.

Principles of Treaty Interpretation

One of the earlier statements of principle regarding the interpretation of Indian treaties is found in *R. v. Taylor and Williams*, in which MacKinnon ACJO stated:

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[437] *R. v. Badger*, [1996] 1 SCR 771 at 794, Cory J.

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the Courts not create, by a remote, isolated current view of events, new grievances.[438]

The Supreme Court of Canada in *Badger* also addressed the unique considerations that must be brought to bear in assessing treaty relationships between the Crown and aboriginal peoples. We have already alluded to these in part in discussing the principles for determining whether a treaty *exists*, and, as we have seen, these principles can apply equally to assist in determining the *meaning* of a treaty. Cory J stated:

> First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See *Sparrow*, *supra*, at pp. 1107-8 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142-43. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See *Simon*, *supra*, at p. 406; *Sioui*, *supra*, at p. 1061; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 404.[439]

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[438] *R. v. Taylor and Williams* (1981), 62 CCC (2d) 227 (Ont. CA) at 232-33.

[439] *R. v. Badger*, [1996] 1 SCR 771 at 793-94, Cory J.

Later in the same judgment, in applying the foregoing principles, Cory J added:

> [W]hen considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. . . . The treaties were drafted in English and by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted. See *Nowegijick*, *supra*, at p. 36; *Sioui*, *supra*, acting pp. 1035-36 and 1044; *Sparrow*, *supra*, acting p. 1107; and *Mitchell*, *supra*, where La Forest J. noted the significant difference that exists between the interpretation of treaties and statutes which pertain to Indians.[440]

In *Sioui*, Lamer J set forth the basis for these conclusions, which, in his view, are rooted in the historical relationship of the Crown and the Indians:

> Finally, once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction. This principle, for which there is ample precedent, was recently reaffirmed in *Simon*. The factors underlying this rule were eloquently stated in *Jones v. Meehan*, 175 U.S. 1 (1899), a judgment of the United States Supreme Court, and are I think just as relevant to questions involving the existence of a treaty and the capacity of the parties as they are to the interpretation of a treaty (at pp. 10-11):
>
>> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no

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[440] *R. v. Badger*, [1996] 1 SCR 771 at 798-99, Cory J.

> written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[441]

In *R. v. Van der Peet*, Lamer CJC was more explicit in attributing the generous interpretation of Indian treaties to the existence of the fiduciary relationship between the Crown and the Indians:

> *General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown*
>
> Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In *Sparrow*, *supra*, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favor of aboriginal peoples:
>
>> When the purposes of the affirmation of aboriginal rights are considered, *it is clear that generous, liberal interpretation of the words in the constitutional provision is commanded*. [Emphasis added.]
>
> This interpretive principle, articulated first in the context of treaty rights – *Simon v. The Queen*, [1985] 2 S.C.R. 387 at p. 402, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390 (S.C.C.); *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at p. 36, 144 D.L.R. (3d) 193 (S.C.C.); *R. v. Horseman*, [1990] 1 S.C.R. 901 at p. 907, 55 C.C.C. (3d) 353 (S.C.C.); *R. v. Sioui*, [1990] 1 S.C.R. 1025 at p. 1066, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427 (S.C.C.) – arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: *R. v. George*, [1966] S.C.R. 267 at p. 279, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386 (S.C.C.).[442]

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[441] *R. v. Sioui*, [1990] 1 SCR 1025 at 1035-36, Lamer J.

[442] *R. v. Van der Peet* (1996), 137 DLR (4th) 289 at 301-02 (SCC), Lamer CJ.

We have already reviewed the five factors listed by Lamer CJ in *Sioui* for determining the legal nature of a document or other instrument recording or defining a relationship between the Crown and the Indians:

1. continuous exercise of a right in the past and at present,
2. the reasons why the Crown made a commitment,
3. the situation prevailing at the time the document was signed,
4. evidence of relations of mutual respect and esteem between the negotiators, and
5. the subsequent conduct of the parties.

It will be recalled that Lamer CJ concluded that these historical factors are equally applicable for interpreting a treaty document or instrument as for determining its legal nature. However, it is also important to recall the Chief Justice's ruling that "extrinsic evidence is not to be used as an aid to interpreting to treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement."[443] Although a "more flexible approach" may be used in determining whether a treaty *exists*, that enhanced flexibility is *not* available, absent ambiguity, when the task is to *interpret* the treaty.[444]

With these principles firmly in mind, we can now address the promises claimed by the First Nation to have been made by Britain to the Indians at the 1837 council: the continuation of presents, the provision of land on which to exercise ancient customs and earn a traditional livelihood, the protection of the Indians against encroachment by white settlers and development, and the assurance that the native allies would be treated in the same manner as other Indians in Canada. For ease of reference, these promises will be referred to simply as presents, land, protection, and equality. We will deal first with presents.

Presents

It is useful to begin by reviewing the relevant portions of Jarvis's address before considering the parties' submissions on the content of the Crown's promise of presents during the 1837 council:

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[443] *R. v. Sioui*, [1990] 1 SCR 1025 at 1049, Lamer J.

[444] *R. v. Marshall* (1997), 146 DLR (4th) 257 at 266 (NSCA).

> Children, – Your Great Father the King has determined that Presents shall be continued to be given to all Indians resident in the Canadas; but Presents will be given to Indians residing in the United States only for Three Years, including the present Delivery.

After explaining the reasons for discontinuing presents to Indians residing in the United States, Jarvis continued:

> But, Children, let it be distinctly understood, that the British Government has not come to a Determination to cease to give Presents to the Indians of the United States. On the contrary, the Government of your Great Father will be most happy to do so, provided they live in the British Empire.
>
> Therefore, although your Great Father is willing that his Red Children should all become permanent Settlers in this Island, it matters not in what Part of the British Empire they reside. They may go across the Great Salt Lake to the Country of their Great Father the King, and there reside and there receive their Presents, or they may remove into any part of the Provinces of Upper and Lower Canada, New Brunswick, Nova Scotia, or any other British Colony, and yet receive them; but they cannot and must not expect to receive them after the End of Three Years if they continue to reside within the Limits of the United States. . . .
>
> *Children! – You must therefore come and live under the protection of your Great Father, or lose the advantage which you have so long enjoyed, of annually receiving valuable presents from him*. . . .
>
> Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. He has relinquished his Claim to this large and beautiful Island on which we are assembled, in order that you may have a Home of your own quite separate from his White Children. The Soil is good, and the Waters which surround the Shores of this Island are abundantly supplied with the finest of Fish.
>
> If you cultivate the Soil with only moderate Industry, and exert yourselves to obtain Fish, you can never want, and your Great Father will continue to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents, and will from Time to Time visit you at this Place to behold your Improvements.[445]

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[445] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, Vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50, 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added. As noted previously, the italicized paragraph was omitted from the second manuscript version (pp. 63751-57) and the version in the *British Parliamentary Papers*, but was included in the Jameson version

Moose Deer Point submits that the intent of these excerpts is clear: an "unlimited" promise to continue to provide presents annually to those native allies who relocated from the United States and settled permanently in Canada.[446] According to counsel, the words of the promises belie Canada's suggestion that the promises were simply intended to implement a policy rather than to create a lasting obligation.[447] Rather, the promises were merely the last in a series of such promises commencing in 1763 in which the Crown formally promised presents in perpetuity.[448]

For its part, Canada urges the Commission to exercise caution in distinguishing between annuities for ceded lands, which might be payable in perpetuity depending on the circumstances of the particular treaty, and presents, which, being based on British policy of the day, were temporary in nature and not intended to last forever.[449] Moreover, since the presents were mere policy, the British government was free to change or abolish them as it saw fit, being under no legal obligation to continue them.[450]

As to the substance of Jarvis's address, Canada contends that the proposed new policy included the following elements:

a) a reserve would be established on Manitoulin Island, for all the Indians of Upper Canada;

b) presents would continue to be distributed to the Indians residing in Upper Canada;

c) Indians residing in the United States would be invited to move to Upper Canada, where they would continue to receive presents;

(reproduced here) and the first manuscript version (pp. 63741-50).

[446] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 77; ICC Transcript, April 8, 1998, p. 98 (Gary Nelson).

[447] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 21.

[448] ICC Transcript, April 8, 1998, pp. 191-93 (Gary Nelson).

[449] ICC Transcript, April 8, 1998, p. 158 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 27.

[450] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 50.

d) Indians who moved to Upper Canada would be encouraged to reside on Manitoulin Island;

e) the distribution of presents to Indians who remained in the United States would be discontinued after 3 years; and

f) the cost of presents, and of the administration of the Indian Department, would be covered by the sale of the surrendered lands in Upper Canada.[451]

The substance of the promises, according to Canada, is that "as Indian allies they were welcome to move to Upper Canada; if they did so, they would continue to receive presents and would be treated in the same way as other Indians in the Province."[452]

Canada submits that, in the absence of an express statement that presents were to be eternal, and having regard to the principles of treaty interpretation, the task of the Commission is to choose a time frame that is realistic and reflects the intention of both parties.[453] A perpetual guarantee of presents is not supported by the historical context; according to Canada, Britain's policy of providing presents was expedient and transient, waxing and waning depending on the Crown's need for Indian allies from time to time, and by 1837 that need had virtually ceased.[454] Moreover, counsel argues that Anderson's speech announcing the complete termination of presents commencing in 1852 demonstrates that presents were merely intended to help the Indians establish themselves, and that presents ceased to be necessary or "just" once the Indians had obtained land and were receiving annuities.[455] Therefore, it should be inferred that the delivery of presents was intended to be terminable on reasonable notice since, in counsel's submission, it would be unreasonable for a court to read the word "perpetual" into a contract where the parties have not specifically provided for it.[456]

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[451] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 5, 28.

[452] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 33.

[453] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 22; ICC Transcript, April 8, 1998, pp. 154-55 (Perry Robinson).

[454] Reply Submission on Behalf of the Government of Canada, April 1, 1998, pp. 23-26.

[455] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 49.

[456] ICC Transcript, April 8, 1998, pp. 153-54 (Perry Robinson); Reply Submission on Behalf of the Government of Canada, April 1, 1998, pp. 19-21.

Although Jarvis specifically established a termination date following which presents would no longer be paid to Indian allies residing in the United States, Canada submits that he did *not* state or imply that the Indians who moved to Canada would receive presents forever. When the Crown intends to grant a right in perpetuity, it normally does so expressly, but in this case Jarvis merely stated that presents would *continue* on an *annual* basis. Accordingly, argues Canada, the failure to include specific wording should be interpreted as meaning a lack of intention to provide presents perpetually; "'annually' means payment every year, but it doesn't mean forever."[457] The inconsistent responses of the various Indian Chiefs to Anderson's speech in 1852 demonstrate that at least some of the Indians understood that presents would not be permanent.[458]

In response to Canada's submissions, Moose Deer Point argues that to suggest presents were given to the Indians when they were poor and could not support themselves is "patently untrue." Rather than being a form of charity, the presents represented consideration for the Indians' trade and military alliance with Britain, and "Anderson's statement was an expedient pretext for an unconscionable breach of promise."[459] Moreover, there is nothing in Jarvis's address to suggest that the cost of presents or the administration of the Indian Department would be covered by the sale of surrendered lands, since surrender was not mentioned at all.[460] Finally, the First Nation submits that it is no answer that some of the Indians may have understood statements by the Crown's officers in different ways because "[t]hese statements and promises could not be clearer": perpetual presents or financial assistance as a matter of treaty entitlement to those Indian allies who moved to Canada.[461]

In the Commission's view, the question of presents in this case is anything but clear. By its very nature, the term "present" suggests a gift or gratuity, and *Black's Law Dictionary* defines "gift" as "[a] voluntary transfer of property to another made gratuitously and without consideration."[462] Similarly, *The Canadian Law Dictionary* defines "gift" as "[a] voluntary transfer of any thing made without consideration or expectation of consideration."[463] In other words, if the Commission were to accept these definitions as applicable to the presents in this case, we would have to assume that the presents were given without consideration and, as such, could presumably be unilaterally terminated at any time by the Crown. This approach is very much in keeping with Canada's view of presents as simply a matter of British policy to be varied in accordance with the circumstances of the day, but it is clearly inconsistent with the Indian perspective. As James Clifton has written:

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[457] ICC Transcript, April 8, 1998, pp. 149-53 (Perry Robinson).

[458] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 49-50; ICC Transcript, April 8, 1998, p. 159 (Perry Robinson).

[459] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 4.

[460] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 4.

[461] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 21.

> Much of what contemporary officials defined as abuses and misuses of the system, we can see in retrospect, represented quite different cultural definitions placed on the same custom. Most Visiting Indians had quickly come to view presents as their legitimate due, as debts contracted for first by the French and then inherited and enlarged by the British, debts for lands surrendered or for services performed in earlier years, debts that were subject to perpetual repayment across the generations.
>
> British authorities, on the other hand, with their "straight Rail Road habits of the Chartered Accountant," as Sir Francis Bond Head put it, placed a much narrower and more limited cast on the practice. War service pensions were one category of payments due only to specified veterans and their widows, while payments for lands ceded were due only for the term of years and to the parties identified in particular treaties, while both these categories were to be accounted for in different columns and books than those used to record the distribution of presents. Presents were purely a matter of royal beneficence, these officials were convinced, a matter of charity, equity, and generosity, not a legal obligation.[464]

In our view, presents were more than mere gifts or charity. We have already concluded that the address of 1837 amounted to a treaty and not simply an announcement of Crown policy. We also find that, contrary to the dictionary definitions of "gift," not only was consideration *given* by the Indians in this case in the form of military assistance and trade, it was *expected*. We cannot imagine that Britain would have been prepared to provide presents to the Indians without an understanding and expectation of some form of *quid pro quo*.

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[462] *Black's Law Dictionary*, 5th ed. (St Paul, Minnesota: West Publishing Co., 1979), 619.

[463] *The Canadian Law Dictionary* (Toronto: Law and Business Publications (Canada) Inc., 1980), 163.

[464] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 29).

That being said, we see nothing in the record of Jarvis's address indicating the duration of payment of annual presents, other than that presents would be discontinued for Indians who remained in the United States. There are explicit statements that "Presents shall be *continued* to be given to all Indians resident in the Canadas," and that the "Great Father will *continue* to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents." However, it is a stretch for us to conclude that a promise to continue the annual payment of presents constitutes an express promise in perpetuity. There is some merit in Canada's argument that, where the Crown has intended to promise something in perpetuity, it has said so expressly.

Has a promise of perpetual presents been made implicitly? We are not certain, and, given subsequent events, we do not believe that it is necessary for us to decide the question. It will be recalled that, in 1852, Indian Superintendent Anderson met with the Indians at Penetanguishene to inform them that presents to Indians resident in Canada would be gradually phased out over the next few years. Anderson justified the decision on the basis that presents were charity that had been given to the Indians when they were poor and could not support themselves; however, presents were no longer required "now that many of you have become farmers, have annuities, plenty of land, pay no taxes and are well able to work."[465]

We disagree with this characterization of presents by Anderson and later by Canada in its submissions to this inquiry. In particular, we cannot agree that terminating presents to the Moose Deer Point First Nation's ancestors could be justified on the basis of annuities and land, since they received neither. We also disagree with Canada's portrayal of the 1837 promises as a mere agreement which, in the absence of an express term regarding the duration of presents, the Crown could terminate upon reasonable notice. That being said, however, we must consider the termination of presents in the context of parliamentary supremacy and the power of the Crown to terminate treaty obligations unilaterally in the years before the protection of aboriginal and treaty rights in subsection 35(1) of the *Constitution Act, 1982*.

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[465] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268 (ICC Exhibit 22, p. 163980).

The Supreme Court of Canada has issued apparently conflicting rulings on what is required to terminate a treaty. In *R.* v. *Horseman,*[466] commercial hunting rights protected by Treaty 8 were found to have been extinguished unilaterally by the *Natural Resources Transfer Agreement*, entered into by the federal government and the Province of Alberta in 1930. The facts of the case were straightforward. While hunting, the accused, a member of the Horse Lake Indian Band, was attacked by a grizzly bear, which he killed in self-defence. Later, finding himself in difficult financial circumstances, he sold the bear's hide and was convicted of trafficking in wildlife contrary to section 42 of the province's *Wildlife Act*. On appeal to the Supreme Court of Canada, the accused contested certain judicial decisions which held that the right of Indians to hunt for sport or commercially could be regulated by provincial game laws, but the right to hunt for food could not:

> Firstly, it is argued that when it is looked at in its historical context, the 1930 Transfer Agreement was meant to protect the rights of Indians and not to derogate from those rights. Secondly, and most importantly, it is contended that the traditional hunting rights granted to Indians by Treaty 8 could not be reduced or abridged in any way without some form of approval and consent given by the Indians, the parties most affected by the derogation, and without some form of compensation or quid pro quo for the reduction in the hunting rights. Thirdly, it is said that on policy grounds the Crown should not undertake to unilaterally change and derogate the treaty rights granted earlier. To permit such a course of action could only lead to the dishonour of the Crown. It is argued that there rests upon the Crown an obligation to uphold the original native interests protected by the treaty. That is to say, the Crown should be looked upon as a trustee of the native hunting rights.[467]

By a 4-3 majority, the Court concluded that the *Natural Resources Transfer Agreement* did feature a *quid pro quo* since the withdrawal of the right to hunt commercially was offset by extending the geographical areas in which Indian people could hunt for food, by eliminating seasonal limitations on the Indians' right to hunt, and by placing the Indians' means of hunting beyond the reach of provincial governments. Cory J (Lamer, La Forest, and Gonthier JJ concurring) stated:

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[466] *R. v. Horseman*, [1990] 3 CNLR 97 (SCC).

[467] *R. v. Horseman*, [1990] 3 CNLR 97 at 121-22 (SCC), Cory J.

> It can be seen that the quid pro quo was substantial. Both the area of hunting and the way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments. . . .
>
> It is thus apparent that although the Transfer Agreement modified the treaty rights as to hunting, there was a very real quid pro quo which extended the native rights to hunt for food. In addition, although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 agreement without consultation with and concurrence of the native peoples affected, *nonetheless the power of the federal government to unilaterally make such a modification is unquestioned and has not been challenged in this case.*[468]

Although she disagreed with the disposition of the appeal, Wilson J (Dickson CJ and L'Heureux-Dubé J concurring) agreed with the implications of existing judicial authorities on the question of the Crown's power to amend treaty obligations unilaterally:

> In my view, the decisions in *Smith* and *Wesley*, cases that were decided shortly after the Transfer Agreement came into force, as well as later decisions in cases like *Strongquill* and *Frank*, make clear that, to the extent that it is possible, one should view para. 12 of the Transfer Agreement as an attempt to respect the solemn engagement embodied in Treaty 8, not as an attempt to abrogate or derogate from that treaty. While it is clear that para. 12 of the Transfer Agreement adjusted the areas within which Treaty 8 Indians would thereafter be able to engage in their traditional way of life, given the oral and archival evidence with respect to the negotiation of Treaty 8 and the pivotal nature of the guarantee concerning hunting, fishing and trapping, one should be extremely hesitant about accepting the proposition that para. 12 of the Transfer Agreement was also designed to place serious and invidious restrictions on the range of hunting, fishing and trapping related activities that Treaty 8 Indians could continue to engage in. *In so saying I am fully aware that this court has stated on previous occasions that it is not in a position to question an unambiguous decision on the part of the federal government to modify its treaty obligations*: *Sikyea v. R.*, [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80 [N.W.T.]; *R. v. George*, [1966] S.C.R. 267, 47 C.R. 382, [1966] 3 C.C.C. 137, 55 D.L.R. (2d) 386 [Ont.]; and *Moosehunter v. R.*, [1981] 1 S.C.R. 282 at 293, 59 C.C.C. (2d) 193, 123 D.L.R. (3d) 95, 9 Sask. R. 149, 36 N.R. 437. *We must, however, be satisfied that the federal government did make an "unambiguous decision" to renege on its Treaty 8 obligations when it signed the 1930 Transfer Agreement.*[469]

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[468] *R. v. Horseman*, [1990] 3 CNLR 97 at 122-23 (SCC), Cory J. Emphasis added.

[469] *R. v. Horseman*, [1990] 3 CNLR 97 at 108-09 (SCC), Wilson J. Emphasis added.

From this decision, the Court appeared to say that the Crown can modify its treaty obligations by making a clear and unambiguous decision to do so.

Three weeks later, however, the Court issued its unanimous decision in *Sioui*. In that case, the Crown argued that the treaty of September 5, 1760, had been extinguished by a series of documents and events, consisting of the Act of Capitulation of Montreal signed on September 8, 1760, the Treaty of Paris signed on February 10, 1763, the *Royal Proclamation* of October 7, 1763, the legislative and administrative history of the Hurons' land, and "the effect of time and non-user of the treaty." Lamer J stated:

> Neither the documents nor the legislative and administrative history to which the appellant [Crown] referred the Court contain any express statement that the treaty of September 5, 1760 has been extinguished. Even assuming that a treaty can be extinguished implicitly, a point on which I express no opinion here, the appellant was not able in my view to meet the criterion stated in *Simon* regarding the quality of evidence that would be required in any case to support a conclusion that the treaty had been extinguished. That case clearly established that the onus is on the party arguing that the treaty has terminated to show the circumstances and events indicating it has been extinguished. This burden can only be discharged by strict proof, as the Chief Justice said at pp. 405-6:
>
> > Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises.[470]

As to the Crown's argument that the treaty in *Sioui* had been terminated by the Act of Capitulation of Montreal and the Treaty of Paris, Lamer J held that these documents did not amount to "persuasive evidence of extinguishment of the treaty." He continued:

> It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred: *Simon*, *supra*, at p. 410, and *White and Bob*, *supra*, at p. 649. *The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty*

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[470] *R. v. Sioui*, [1990] 1 SCR 1025 at 1061.

> *cannot be extinguished without the consent of the Indians concerned. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary consent to its extinguishment.*[471]

In the Commission's view, although *Sioui* seems to contradict *Horseman*, the statement by Lamer J that a treaty cannot be extinguished without the consent of the Indians concerned must be considered *dicta*, given that he had already concluded that the documents and events proffered by the Crown as evidence of extinguishment fell short of proving that fact. In the context of the earlier decision in *Horseman*, we take from Justice Lamer's reasons the principle that extinguishment will not be implied as an incidental effect of an agreement between the Crown and another party if the Indians are not also party to that agreement. We see no reason why a distinction in principle should be made between, on the one hand, an agreement like the *Natural Resources Transfer Agreement*, involving the federal Crown and a provincial counterpart, as in *Horseman*, and, on the other hand, an agreement between the federal Crown and an international counterpart, as in *Sioui*. In either case, if the result of the agreement is to extinguish Indian treaty rights, that result should not obtain unless that intent is clearly and unambiguously stated; alternatively, if the intent to extinguish is *not* clear and plain, but rather is incidental or implicit, then the extinguishment should not obtain without, as Lamer J concluded, the consent of the Indians concerned as parties to the agreement.

We believe that this analysis is supported by later decisions of the Supreme Court of Canada. For example, in *Badger*, Cory J stated:

> . . . the existence of the NRTA has not deprived Treaty No. 8 of legal significance. *Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. Treaty rights can only be amended where it is clear that effect was intended.* It is helpful to recall that Dickson J. in *Frank, supra*, observed at p. 100 that, while the NRTA had partially amended the scope of the Treaty hunting right, "of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food" (emphasis added). I believe that these words support my conclusion that the Treaty No. 8 right to hunt has only been altered or modified by the NRTA to the extent that the NRTA evinces a clear intention to effect such a modification. This position has been repeatedly confirmed in the decisions referred to earlier. Unless

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[471] *R. v. Sioui*, [1990] 1 SCR 1025 at 1063. Emphasis added.

> there is a direct conflict between the NRTA and a treaty, the NRTA will not have modified the treaty rights.[472]

Similarly, in a dissenting judgment in *Van der Peet*, McLachlin J derived the test for the extinguishment of aboriginal rights from American jurisprudence establishing the same test for the extinguishment of treaty rights:

> For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow, supra*, at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "*what is essential [to satisfy the 'clear and plain' test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty*" or right.[473]

In the Commission's view, the cumulative effect of these decisions is that, before the implementation of the *Constitution Act, 1982*, the Crown could unilaterally extinguish treaty rights as long as it expressed a "clear and plain" intention to do so. To borrow from McLachlin J in *Van der Peet*, such a "clear and plain" intention is evident where the government actually considers the conflict between its intended action on the one hand and Indian treaty rights on the other and chooses to resolve that conflict by abrogating the treaty. Employing this test, we have no doubt that, even if it did not recognize that the council of 1837 had given rise to a treaty, the Crown in 1852 must be considered as having clearly recognized its continuing obligation to provide the Indians with presents, as well as the importance attached to that obligation by the Indians. The Crown must also be viewed as having chosen, through the clear and plain words of Anderson at Penetanguishene, to terminate that obligation:

> When I last met you in Council I told you the period was near at hand when you would get no more Presents. I did not know at that time that the day was so near, but

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[472] *R. v. Badger*, [1996] 1 SCR 771 at 796-97, Cory J. Italic emphasis added.

[473] *R. v. Van der Peet* (1996), 137 DLR (4th) 289 at 385 (SCC), McLachlin J. Emphasis added.

> the time has arrived and *this is the last day (year) that Your Great Mother's Blankets will be issued to you*. . . .
>
> This letter informs you that *your Great Mother's Councillors had considered the subject of the Indian Presents; that after many days (years) serious thought about the matter they have concluded that this shall be the last time this bounty shall be distributed to the settled Indians in Upper Canada*. . . .
>
> I have told you that this is the last time you will receive Blankets from the Gov[ern]m[en]t and to show you with how much care it has considered your interest I now tell you that next year, three fourths of the value of the Presents will be paid in money, that is to say, the amount will be added to your annuities respectively and apply in the same way that your annuities are. The year after only one half will be allowed you, and the following, being the last year only one fourth, and *thus will end what is called Indian Presents*. The Government, my friends, have adopted this humane mode of putting an end, by degrees, to the gratuity which you and your fathers have received for nearly a hundred years merely out of charity because you were not able to clothe yourselves.[474]

We do not see how the Crown's intention to terminate its obligation could have been stated more clearly. That being the case, we must conclude that the Moose Deer Point First Nation's treaty right to presents, whether perpetual or not, was effectively extinguished in 1852.

Land and Protection

The Moose Deer Point First Nation alleges that the 1837 address included promises, first, to provide the Indians with their own reserve lands as well as rights to use and occupy adjoining lands, on which to exercise their ancient customs and earn a traditional livelihood; and, second, to protect the Indians in their enjoyment of these lands against encroachment by white settlers and development. We have previously referred to these promises as the promises of land and protection. Because the facts underlying each promise are similar, the Commission proposes to deal with the parties' arguments regarding these promises jointly. Our analysis of the promises will be dealt with separately, however.

The wording of the 1837 address is again critical to a consideration of these claims. It will be recalled that, in the meeting at Manitowaning on Manitoulin Island, Jarvis stated:

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[474] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, pp. 163974 and 163976 (ICC Exhibit 22). Emphasis added.

> But, Children, let it be distinctly understood, that the British Government has not come to a Determination to cease to give Presents to the Indians of the United States. On the contrary, the Government of your Great Father will be most happy to do so, provided they live in the British Empire.
>
> Therefore, although your Great Father is willing that his Red Children should all become permanent Settlers in this Island, it matters not in what Part of the British Empire they reside. They may go across the Great Salt Lake to the Country of their Great Father the King, and there reside and there receive their Presents, or they may remove into any part of the Provinces of Upper and Lower Canada, New Brunswick, Nova Scotia, or any other British Colony, and yet receive them; but they cannot and must not expect to receive them after the End of Three Years if they continue to reside within the Limits of the United States. . . .
>
> Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. He has relinquished his Claim to this large and beautiful Island on which we are assembled, in order that you may have a Home of your own quite separate from his White Children. The Soil is good, and the Waters which surround the Shores of this Island are abundantly supplied with the finest of Fish.
>
> If you cultivate the Soil with only moderate Industry, and exert yourselves to obtain Fish, you can never want, and your Great Father will continue to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents, and will from Time to Time visit you at this Place to behold your Improvements.[475]

The Moose Deer Point First Nation submits that, since Britain's native allies in the United States were invited to settle permanently in Canada, land was necessarily implicit in the promise.[476] To the extent that Canada fails to recognize this inherent requirement to provide land, it fails to come to grips with the promise of refuge and the invitation to settle permanently.[477] As counsel remarked:

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[475] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1837, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49).

[476] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 72.

[477] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 22.

> You cannot settle allies who were dispossessed and who were dispersed without placing land at their disposal.
>
> It is implicit in an invitation to come to settle in Canada that land will be placed at their disposal. . . .
>
> Permanent settlement is the key here, because that is the condition that was required for those who were to come across. They had to settle permanently in Canada.[478]

According to the First Nation, the implicit need to provide land can be seen in the unsigned note, likely from Chief Superintendent James Givins to Anderson, upon the arrival of 215 Chippewa and Pottawatomi from the Milwaukee area in 1835 to request presents and permission to settle. Givins wrote that "the Indians may remain under our protection and have land offered to them."[479] Similarly, counsel points to land previously provided to Iroquois loyalists following the American War of Independence and to other refugees following the Battle of Fallen Timbers as evidence that the Crown itself had recognized on several occasions that land would have to be made available to the relocating Indians.[480]

Moreover, the First Nation contends that the Indians to whom Jarvis spoke were not limited in the place of residence they could select. Although the native allies were encouraged to settle on Manitoulin Island, Jarvis specifically indicated that they could move anywhere in the British Empire, including England itself, and continue to receive presents there.[481] In the First Nation's submission, this fact demonstrates that providing land wherever the Indians chose to settle must be implied in the 1837 address. Although it was anticipated that the Indians would take up cultivation, they were also expected to continue their traditional way of life based on hunting, fishing, and trapping.[482] The presents they had been receiving, and were promised to continue receiving, were not money, but included goods such as rifles, ball, shot, and butcher knives that were all staples of that traditional lifestyle. That being the case, argues counsel, the parties must have contemplated that the Indians would be given land for their occupation and use in carrying on their traditional economy using the presents given to them by the Crown.[483]

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[478] ICC Transcript, April 8, 1998, pp. 27-28, 54-55 (Gary Nelson).

[479] T.G. Anderson, Indian Superintendent, Manitowaning, to Colonel James Givins, Chief Superintendent, July 16, 1835, NA, RG 10, C-11019, vol. 58, pp. 59677-79, in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 1).

[480] ICC Transcript, April 8, 1998, pp. 95-96 (Gary Nelson).

[481] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 67, 72; Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 4; ICC Transcript, April 8, 1998, p. 56.

[482] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 67; ICC Transcript, April 8, 1998, p. 55 (Gary Nelson).

In the First Nation's view, it would be unconscionable for Canada to suggest that "the Crown's promise of refuge meant that the native allies who had contributed so significantly to the successful defence of Canada should be offered refuge as landless mendicants, without the right to carry on their traditional life upon the land, without any other basis of supporting themselves and dependent only on grace and benevolence."[484] Rather, counsel submits that land was promised – expressly in the case of Manitoulin Island, and implicitly in the promise of refuge for permanent settlers.[485] Although the First Nation acknowledges that the Crown has no power to *grant* rights of use and occupation in lands over which other First Nations hold aboriginal title, it argues that the Crown can *recognize* aboriginal title and rights in such lands, and that it was and is common for the Crown to promote cooperative arrangements to share territory. As a result, the Crown was obliged to provide land in one or more of three ways: by purchasing it (as the Crown did for Iroquois loyalists), by setting it aside out of lands already ceded by First Nations, or by arranging for the acceptance of the immigrating Indians on lands already settled by established First Nations.[486] "In essence," says the First Nation, "under the treaty, the allies were to be provided with lands on which to settle permanently, which would permit them to adopt a more settled economy over time and they were to enjoy aboriginal rights in the vicinity of their settlements," provided that the native people holding aboriginal title to the land agreed to that right.[487] This "more settled economy" was in the common interest of both the Crown and the Indians, since it would prevent the Indians from coming into conflict with other settlers, and therefore it was appropriate for the Crown to set aside sufficient lands on which the Indians could continue their traditional economy while making the transition to a more modern economy as settlement advanced.[488]

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[483] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 73; ICC Transcript, April 8, 1998, pp. 96, 201-02 (Gary Nelson).

[484] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 88; ICC Transcript, April 8, 1998, p. 108 (Gary Nelson).

[485] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 87; ICC Transcript, April 8, 1998, p. 108 (Gary Nelson).

[486] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 88; Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, pp. 7-8; ICC Transcript, April 8, 1998, p. 109 (Gary Nelson).

Closely connected to this claim to land is the First Nation's claim that it is and was entitled to be protected by the Crown. According to counsel, this protection was not limited to military protection from the Americans, who were driving the Indian allies from their homelands. It also included protection of the Indians' own lands, as well as protection of their use and occupation of land in the vicinity of their own lands for traditional purposes against the encroachment of white settlers. Given Jarvis's statement that the Indians should rely solely on the Crown for advice in temporal matters, and the reliance of the Indians on that advice by forsaking land payments in the United States for the "known certainty" of presents, Moose Deer Point submits that the Crown should be considered to have undertaken a fiduciary obligation to protect the First Nation's interests.[489]

Finally, the First Nation argues that other bands have already recognized Pottawatomi rights to use land, including specific hunting and fishing territories.[490] In some cases, Pottawatomi clans or clan segments were incorporated directly into existing First Nations, where those "adopted" members were permitted to settle permanently, to use and occupy traditional lands of their confederates, to enjoy rights of hunting, fishing, and other traditional pursuits, and to join the social and political organizations of those bands. Alternatively, the Pottawatomi could exercise those rights independently, as did the members of the Moose Deer Point First Nation.[491] The First Nation asserts that the Crown not only recognized the right of the Pottawatomi to enjoy aboriginal interests and to surrender their rights, title, and interest pursuant to formal surrenders, but in fact negotiated a surrender of some of those rights as part of the Robinson-Huron Treaty in 1850 and the Williams Treaty in 1923. As counsel stated:

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[487] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 79.

[488] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 83.

[489] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 74-76; ICC Transcript, April 8, 1998, pp. 97-98 (Gary Nelson).

[490] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 81-82; ICC Transcript, April 8, 1998, pp. 12-21 (Gary Nelson).

[491] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 82.

> I think it is important that the Crown has taken those surrenders, that it has, in effect, recognized that these people were proper parties to these treaties, and I say it would be unconscionable simply to recognize those interests when you're taking a surrender of them, and not recognize those interests when someone else seeks their enforcement.[492]

According to counsel, First Nations do not understand their rights as "aboriginal" or "treaty" rights but simply as rights of use and occupation: "Under the Canadian system of law they are both 'aboriginal rights' (practices, traditions and customs on the land which are integral to their distinctive culture) and 'treaty rights' (it was the common intention of the parties to the treaty evidenced by the 1837 address that the Pottawatomi and other allies should settle permanently here and carry on with their traditional pursuits)."[493]

Canada characterizes Moose Deer Point's claim as, first, a claim for a larger reserve, and, second, a claim of protection for the First Nation's use and occupation of a broader area of lands and waters for traditional purposes in the vicinity of the location in which the Indians chose to settle.[494] Having said that, however, Canada contends that it is not clear that the First Nation is actually seeking a larger reserve, and, if it is,

> . . . how many additional acres, what is the location of that reserve, when should it have been provided, why is 619 acres not sufficient[?]. . .
>
> And what is the extent of the claim rights, it's a right to do what exactly[?] How is this treaty right being infringed to this day? How do we know that it hasn't

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[492] ICC Transcript, April 8, 1998, p. 103 (Gary Nelson).

[493] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 84.

[494] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 27; ICC Transcript, April 8, 1998, p. 163 (Perry Robinson).

> been fulfilled? There has been no evidence submitted regarding any infringement or breach of the right.[495]

Canada also asks how the Crown could even attempt to fulfill a purported obligation to provide a reserve when Jarvis's address "completely failed to mention potential reserve locations, reserve size, or a timeframe for the provision of a reserve?" Although the First Nation argues that this lack of specificity on various items in the treaty is simply a matter for negotiation,[496] the fact that the address was silent on these issues indicates, in Canada's view, that "the Crown did not intend to create an obligation to provide a reserve."[497] Even the eventual survey of the First Nation's reserve in 1917 did not result from any recognition on the Crown's part of any obligation to these Indians to create a reserve for their use and benefit.[498] Counsel also submits that there is no evidence that the Pottawatomi, upon their arrival in Canada, expected the Crown to create reserves for them.[499]

Canada disagrees fundamentally with Moose Deer Point's submission that land was implicitly promised to the Indians wherever they might choose to settle within the British Empire. In Canada's view, "this broad geographical locale is only mentioned in the context of presents, and not in the context of any land based activities."[500] Although counsel agrees that it is not reasonable to suggest that the Crown invited its native allies north to become "hostages to fortune," he contends that the British contemplated the Indians' settling at Manitoulin Island or on existing reserves, provided that, in the latter case, the Indians were able to secure the approval of established bands to settle on their reserves.[501] In fact, according to Canada, Jarvis's address specifically referred to Manitoulin Island, where land *was* provided and to which the references to fishing and agriculture exclusively related.[502]

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[495] ICC Transcript, April 8, 1998, p. 163 (Perry Robinson).

[496] ICC Transcript, April 8, 1998, p. 195 (Gary Nelson).

[497] Reply Submission on Behalf of the Government of Canada, April 1, 1998, pp. 33-34.

[498] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 51.

[499] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 51.

[500] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 30.

Both Canada and Moose Deer Point rely on the principle in *Sioui* that, in the absence of any express language on the term in question, it is to be assumed that the parties to the treaty intended to reconcile the Indians' interests with those of the Crown. According to the First Nation, the interest of its ancestors was to continue their traditional way of life wherever they chose to take up residence, whereas the interests of the Crown were to fulfill its obligations with honour, to have the Indians adopt a more settled way of life over time, and to solve the ongoing problem that the Indian allies caused in the Crown's relations with the United States.[503]

Not surprisingly, Canada takes a different view of the Crown's interest. Counsel argues that it is not realistic to suggest that Britain would have been prepared to guarantee rights of traditional use and occupancy over an area as broad as the British Empire to a group having no such rights in the first place. Similarly, Canada asserts that Britain would not have bound itself to an obligation to protect broadly framed land-based rights that would interfere with the Crown's use of land in Upper Canada when the Crown was at that time in the process of throwing Upper Canada open to settlement. Rather, Canada submits that it would be more realistic and in keeping with Britain's interests in 1837 to conclude that the Crown, through Jarvis's address, invited its Indian allies to take up residence on Manitoulin Island where they could farm and fish for their subsistence.[504]

According to Canada, the First Nation is seeking to have the Commission find that the 1837 address embodied a grant of rights of use and occupation over lands traditionally used and occupied by other First Nations. Counsel argues that, based on the decisions of the Supreme Court of Canada in *Guerin* and *Van der Peet*, the Crown did not have the power to grant such rights, the First Nation's claim being, in Canada's view, a claim for recognition of aboriginal rights.[505] In this setting, counsel contends that, "[w]hatever the merits of the [First Nation's] arguments in support of an aboriginal rights claim, the specific claims policy and the Indian Claims Commission Inquiry process are not the appropriate context to put forward aboriginal rights based claims."[506] Canada has nevertheless proceeded on the assumption that the Moose Deer Point First Nation is merely seeking treaty rights that bestow the attributes of aboriginal rights possessed by other First Nations in 1837.[507]

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[501] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 51; Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 30; ICC Transcript, April 8, 1998, pp. 164-65 (Perry Robinson).

[502] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 30; ICC Transcript, April 8, 1998, p. 165 (Perry Robinson).

[503] ICC Transcript, April 8, 1998, p. 99 (Gary Nelson).

[504] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 31; ICC Transcript, April 8, 1998, pp. 169-70 (Perry Robinson).

In response to the First Nation's position that both Canada and other bands recognized the rights of the Pottawatomi generally and Moose Deer Point members specifically to use and occupy land, counsel for Canada denies that this was the case. The mere participation of Pottawatomi in the Robinson-Huron and Williams Treaties is not evidence that the Crown recognized rights of use and occupation, since the Crown has consistently taken the position that the Pottawatomi had no right to be included in those treaties. According to Canada, the fact that there were Pottawatomi signatories may merely indicate that they were present when the treaties were signed, since the attending British officers did not normally undertake a detailed investigation of the ancestry of the Indians in attendance. Counsel suggests that the signatures of the Pottawatomi – and indeed of all Indians in attendance – may have been obtained out of "an abundance of caution," regardless of whether those signatories resided within the ceded area.[508] As for the acceptance of Pottawatomi rights of use and occupation by other bands, Canada submits that the reception of the Pottawatomi varied according to the circumstances, and that the significant long-term resistance to the Pottawatomi by some bands rebuts the First Nation's claim that, in all cases, other bands accepted the Pottawatomi and permitted them to use and occupy traditional lands.[509]

In rebuttal, the Moose Deer Point First Nation disputes Canada's position that the participation of Pottawatomi in treaties does not mean that Canada recognized Pottawatomi rights to use and occupy land. According to the First Nation, that position is based on two letters written 52 and 95 years respectively after the 1837 address,[510] and thus is not indicative of the Crown's policy and practice in the intervening years. Moreover, the First Nation contends that the letters actually related to the entitlement of a family to draw annuities for lands surrendered under treaty – which does not apply to Moose Deer Point since it has not taken part in any treaty – and not to the entitlement of the Pottawatomi to participate in treaty making. As to the argument that some Pottawatomi became signatories to the Robinson-Huron and Williams Treaties out of an abundance of caution, the First Nation submits that this submission is without merit because "[a]ll things are presumed to have been rightly done by public officers acting in the course of their duties (*omnia presumuntur rite esse acta*)"; counsel asserts that this presumption "cannot be overcome by mere supposition as to [the] motives" of the Crown's representatives.[511]

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[505] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 36.

[506] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 29.

[507] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 29.

[508] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 38-39.

[509] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 39-41.

In response to Canada's position that some other bands resisted the use and occupation of their traditional lands by the Pottawatomi, the First Nation counters that the real source of the friction was the "'civilizing and Christianizing' mission of government and its failure to live up to its promises" to provide presents and land.[512] This meant that, although there were some religious differences between Indian groups, and in some cases established bands did not want to share annuity payments they were receiving from prior surrenders, "in general terms, where the Pottawatomi could join confederate First Nations without being in competition for benefits, or where they could live separately, there is evidence of acceptance."[513] The First Nation also submits that Canada is seeking to "have it both ways" by concurrently arguing, first, that some Pottawatomi were admitted into treaty simply because they were living with and accepted by established bands with whom the

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[510] [L. Vankoughnet, Deputy Superintendent General of Indian Affairs,] to Thomas S. Walton, March 22, 1889, NA, RG 10, vol. 2381, file 78047 (ICC Documents, p. 100); T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, to Samuel Isaac and others, May 27, 1932, DIAND file 475/30-10-79, vol. 3 (ICC Documents, p. 345).

[511] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 10.

[512] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 11; ICC Transcript, April 8, 1998, p. 64 (Gary Nelson).

[513] ICC Transcript, April 8, 1998, p. 64 (Gary Nelson).

Crown's officers were treating, and, conversely, that the Pottawatomi were not accepted by other Indian communities.[514]

Finally, in answer to Canada's assertion that the First Nation had no aboriginal rights over the lands of other bands because those lands were not the First Nation's traditional lands, Moose Deer Point submits that the decision of the Supreme Court of Canada in *R. v. Adams*[515] demonstrates that aboriginal rights do not exist solely where a claim to aboriginal title has been made out.[516]

We will now consider these arguments, looking first at the question of the treaty promise to land and later dealing with the promise of protection.

Land

With respect to the promise of land, the Commission concludes that, although the 1837 address did promise the Indians presents anywhere within the British Empire, the promise to provide land was much more narrowly framed. We appreciate the creative argument urged upon us by counsel for the First Nation that, if the implements of hunting and trapping were to be given as presents to the Indians wherever they might choose to receive them, land and the rights of use and occupation necessary to use those tools should also be given. However, we note that the presents given by the British to their Indian allies consisted of much more than gunpowder, shot, traps, and fishing nets; other items included blankets, pipes and tobacco, kettles, clothing, combs, mirrors, cosmetics, bracelets, medals, and flags. Presumably, many of these presents would have been equally useful and valuable to the Indians regardless of where they resided and what sort of lifestyle they adopted. We do not find that the promise of continuing presents necessarily implied a promise of land and rights of use and occupation anywhere within the British Empire to maintain the Indians' traditional way of life.

We agree with the First Nation that there was a common intention that land should be placed at the disposal of the immigrating Indians, but we find that land was set aside for this purpose on

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[514] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 12.

[515] *R. v. Adams* (1996), 138 DLR (4th) 657 (SCC).

[516] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 87; ICC Transcript, April 8, 1998, p. 100 (Gary Nelson).

Manitoulin Island. In support of this conclusion, we note that, with respect to *presents*, Jarvis is reported to have said:

> Therefore, although your Great Father is willing that his Red Children should all become permanent Settlers in this Island, it matters not in what Part of the British Empire they reside. They may go across the Great Salt Lake to the Country of their Great Father the King, and there reside and *there receive their Presents*, or they may remove into any part of the Provinces of Upper and Lower Canada, New Brunswick, Nova Scotia, or any other British Colony, *and yet receive them*. . . .[517]

It seems incontrovertible from this statement that the incoming Indians might travel freely within the British colonies, and indeed to England itself, and still receive presents. However, with respect to *land*, Jarvis stated:

> Your Great Father who lives across the Great Salt Lake is your Guardian and Protector, and he only. *He has relinquished his Claim to this large and beautiful Island on which we are assembled, in order that you may have a Home of your own quite separate from his White Children*. The Soil is good, and the Waters which surround the Shores of this Island are abundantly supplied with the finest of Fish.
>
> If you cultivate the Soil with only moderate Industry, and exert yourselves to obtain Fish, you can never want, and *your Great Father* will continue to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents, and *will from Time to Time visit you at this Place to behold your Improvements*.[518]

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[517] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, Vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added.

[518] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added.

We take from this statement the intention on the part of the British to provide lands to the incoming Indian allies in locations where they would be isolated from white settlers – "a Home of your own quite separate from his White Children." This expressly included "this large and beautiful Island on which we are assembled" – Manitoulin Island. Of course, it might also be inferred that this would also include other areas not yet settled or desired by white settlers, provided the Crown was prepared to allow Indians to reside there, or on reserves that had already been established by other bands, provided those bands were also prepared to consent. However, the evidence before the Commission indicates that, within the immediate time frame of the 1837 council, the Crown was prepared to allow its incoming allies to settle on the reserves of those bands that might have them, but it was otherwise not at all inclined to permit Indians in areas other than Manitoulin Island.

Although the Crown was willing to "continue to bestow annually on all those who permanently reside here or in any Part of his Dominions valuable Presents," it is notable that Jarvis added that the Crown's representatives "will from Time to Time visit you *at this Place* to behold your Improvements." The implication of this statement and the preceding ones, in our view, is that the Indians were welcome to establish homes and improve the land on Manitoulin Island. It was only to this location that the Crown would come to "behold" the Indians' improvements. Although Britain indicated a willingness to continue to provide presents anywhere in the empire to those Indians who emigrated permanently from the United States, and while it was presumably open to the Crown to agree to provide land to its allies at any location within the empire, there is no indication of any willingness to have the Indians establish improvements other than "at this Place" – Manitoulin Island.

This conclusion is sustained by the historical background during the years preceding Jarvis's address. In 1829, the Indian policy inaugurated by Lieutenant Governor John Colborne involved consolidating Indians on small reservations where they could be re-educated, trained, and "civilized."[519] The Colborne plan sought to "balance conscience and pocket-book,"[520] "the liberal-minded but economically-fixated imperial authorities . . . [being] fully aware that the Indians in the Canadian colonies were becoming increasingly destitute and unable either to sustain their traditional lifestyle or to defend their land and property."[521] The plan had four main components: to collect the Indians in considerable numbers and to settle them in villages (reserves) with a due portion of land for their cultivation and support; to make provision for their religious improvement, education, and instruction in husbandry; to afford them assistance in building houses and in procuring seed and agricultural implements, "commuting when practical, a portion of their presents for the latter"; and to provide "active and zealous" Wesleyan missionaries to counteract the effects of the "objectionable principles" instilled by the Methodist missionaries.[522]

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[519] James A. Clifton, "'Visiting Indians' in Canada," manuscript for Parks Canada booklet, 1979 (ICC Exhibit 11, p. 39).

[520] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 181).

As we have already seen, the Colborne plan met with mixed success. However, within a few months of the arrival of Sir Francis Head to succeed Colborne as Lieutenant Governor, he advised shipping the "few remaining Indians who are lingering in Upper Canada" to "Manitoulin Island and other Islands in Lake Huron, or elsewhere towards the North West."[523] While Head's policy was clearly geared towards removing and isolating the Indians from white settlers, it can be seen that the Colborne plan, while aimed at eventual "civilization" and integration, was initially no less segregationist.

Similarly, in the years following the 1837 council, British policy continued to demonstrate that the Indians were not intended to be free to take up land wherever they chose. For example, on February 17, 1840, Jarvis wrote with regard to the arrival of 222 members of the Manicoupouts Band from the United States:

> I sincerely hope that none of this Band will adhere to what appears to me to be their intention, viz. of remaining on the St. Clair, the Government are [sic] extremely anxious that all those Indians who came in from the United States should proceed on to the Manitoulin Island, they have decided on maintaining that establishment and will not in future go to any expense elsewhere.[524]

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[521] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 181).

[522] Allen, *His Majesty's Indian Allies* (ICC Exhibit 4, p. 181).

[523] Sir F.B. Head to Lord Glenelg, November 20, 1836 (ICC Documents, p. 8).

[524] S.P. Jarvis, Chief Superintendent, to unknown ["either to J.W. Keating, Walpole Island, or Wm. Jones, Port Sarnia"], February 17, 1840, NA, RG 10, C-11025, vol. 72, pp. 67179-80, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 9).

Moreover, as we have already seen, Jarvis instructed his Superintendents in May of that year to encourage those Pottawatomi who had taken up residence on Walpole Island to proceed to Manitoulin Island, since "[t]hey must not expect to be assisted by Government unless they do go there."[525] On June 22, 1840, J.W. Keating advised Jarvis that he intended to tell some newly arrived "Saginaws" that "they must go to [Manitoulin] Island unless they were prepared to dispence [sic] with all assistance from government in the way of land to cultivate or clothing."[526] It was in this same correspondence that Keating reported his unsuccessful efforts to direct other Indians, including Pottawatomi, to go there as well, and cynically noted how the Indians might eventually be persuaded:

> [T]hey will not be guided & . . . do not I believe anticipate the consequences I have predicted to them . . . it will only be when they find themselves naked & hungry which they will [be] in a year or so that they will succumb. That will I think be the best way of proceeding. [L]et . . . them suffer, & want presents & they will become tractable & plastic enough.[527]

Even as late as 1852, in his speech regarding the termination of presents, Indian Superintendent Anderson referred to the intention to settle the Indians on Manitoulin Island:

> Reflect seriously on what I have said and recollect, I again repeat it, that Your Great Father will not encourage your remaining in small bands, nor will he help you to settle on any Island unless it be the Great Manitoulin.[528]

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[525] S.P. Jarvis, Chief Superintendent, to unknown ["probably either J.W. Keating, Walpole Island, or Wm. Jones, St. Clair"], May 9, 1840, NA, RG 10, C-11026, vol. 73, pp. 67704-06, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, pp. 9-10).

[526] J.W. Keating, Indian Superintendent, Sutherlands, to S.P. Jarvis, Chief Superintendent, June 22, 1840, NA, RG 10, vol. 73, pp. 67819-20, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 11).

[527] J.W. Keating, Indian Superintendent, Sutherlands, to S.P. Jarvis, Chief Superintendent, June 22, 1840, NA, RG 10, vol. 73, pp. 67819-20, cited in "Pottawatomie Correspondence Collected by Franz Koennecke" (ICC Exhibit 15, p. 11).

[528] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268, pp. 163978 (ICC Exhibit 22).

Assistance in the form of land, then, was contingent on the Pottawatomi and other Indians locating on Manitoulin Island or other Crown-sanctioned locations.

Even applying a generous and liberal approach, we are unable to conclude that the 1837 council included a promise that reserve lands would be set aside for the Pottawatomi wherever they might settle. The fact that the Indians were advised they could receive their presents even "across the Great Salt Lake" (that is, in England), where reserve lands would most certainly not have been made available, suggests otherwise.

We should add that we have taken note of Canada's argument that land other than Manitoulin Island did not comprise part of the promises because terms such as the area to be provided, the location of these other lands, and the date when such lands should be set apart were not stipulated. While this may be true, the lack of specificity is not, in our view, decisive. Many of the same shortcomings are evident with respect to the promise of land at Manitoulin Island; yet, to the extent that Canada is prepared to concede that the 1837 council created binding obligations at all, it has acknowledged that the Indians were promised a place to settle there.[529] In this context, we note that, at the end of oral submissions in this inquiry, Commissioner Corcoran asked counsel for Canada whether the Moose Deer Point First Nation might have an outstanding claim to land on Manitoulin Island, and, notwithstanding the lack of specificity, counsel conceded that, if the First Nation submitted a further claim, Canada would have to consider it.[530] It is also worth mentioning that even the numbered treaties in western Canada were plagued by what modern legal draftsmen might consider inattention to detail with respect to such matters, but Canada has nevertheless been prepared to recognize its binding obligations arising from those instruments.

The Commission therefore concludes that the 1837 address included an express promise to provide land at Manitoulin Island. In light of the lack of specificity in the address regarding the particulars of reserve size, and the lack of evidence regarding the amount of treaty land that other bands received, we are unable to conclude at this point whether this treaty right has been satisfied by the provision of 619 acres to the First Nation in 1917. The parties have filed some evidence regarding the amount of reserve land received by the First Nation relative to other First Nations,[531] but we have not received any submissions dealing with this evidence and are thus unable to gauge its significance. Accordingly, we recommend that the parties attempt to negotiate a settlement of the treaty land entitlement issue, failing which it is open to the First Nation to request a further inquiry to establish the area of land to which it is entitled.

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[529] ICC Transcript, April 8, 1998, p. 212 (Perry Robinson).

[530] ICC Transcript, April 8, 1998, p. 213 (Perry Robinson).

It may not be possible at this late date for Canada to satisfy any outstanding right of the First Nation to treaty land by delivering land on Manitoulin Island, and we are not sure that, even if such an entitlement exists, the First Nation would even want land there. Clearly, the Crown has already provided the First Nation with some land at Moose Deer Point. If other land is available in that vicinity, it could perhaps form part of a settlement package, assuming that an outstanding entitlement exists. If no such land is available, then the parties may have to resort to alternative forms of consideration. We are aware that other treaty land entitlement claims have been resolved by Canada's payment of consideration in forms more readily available and better suited to the needs of the First Nation involved. In either event, the 619-acre reserve established for the First Nation in 1917 must be factored into the settlement to ensure that the First Nation is not overcompensated in terms of any outstanding treaty land entitlement it may have.

Protection

The second aspect of Moose Deer Point's land-related claims involves asking whether the First Nation is entitled to "protection" in the use and occupation of its own reserve lands, but also in relation to its use and occupation of nearby lands for traditional purposes such as hunting, trapping, and fishing. As we have already seen, the submission of the First Nation is that the Crown promised to protect the Pottawatomi from encroachment by white settlement, including development in the vicinity of their reserves that would tend to limit their ability to make effective use of adjoining lands for such traditional purposes. In making this argument, the First Nation submits that the promise of protection gives rise to a fiduciary duty arising not from the nature of aboriginal title and its alienability, as was the case in *Guerin*,[532] but from the agreement or undertaking of the Crown to act as guardian and protector.[533] A determination of whether this is so requires an examination of what the nature and scope of a promise of British protection may have meant in 1837. We must also consider whether the promise of British protection extended to the use and occupation of lands wherever the Pottawatomi might take up residence, including their ultimate settlement at Moose Deer Point.

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[531] Ian Johnson, United Indian Councils, to Larry Gilberg, December 9, 1992, with attached table entitled "Population Density Comparisons: Urban Reserves" (ICC Documents, pp. 357-58).

While the factual and contextual information before us on the meaning of "protection" as used in the 1837 address is sketchy and incomplete, we know that the terms of the *Royal Proclamation of 1763* reserved for aboriginal peoples throughout much of what is now Ontario[534] possession of their unceded lands and territories as a hunting ground. The terms of the *Proclamation*, which excluded all but licensed traders from travel within the territories, described the area as a hunting ground for those nations living under British "protection." It was as a result of the *Royal Proclamation* that surrenders of land were required from those Indians inhabiting the lands within the *Proclamation* territory before those lands could be used for settlement. The *Royal Proclamation* states:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that *the several Nations or Tribes of Indians* with whom We are connected, and *who live under our Protection, should not be molested or disturbed in the Possession of such part of our Dominions and Territories as not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds*.
>
> . . . We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included with the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward

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[532] *Guerin v. The Queen*, [1984] 2 SCR 335.

[533] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 74-75.

[534] The *Royal Proclamation* exempted the Hudson's Bay Charter of 1670, and lands north of the height of land.

> of the Sources of the Rivers which fall into the Sea from the West and North West. . . .[535]

In *White and Bob*, Justice Norris stated that the promise of protection within the *Royal Proclamation* was afforded to the use of lands:

> It is clear that what was thus reserved to them under the *Royal Proclamation* was not mere possession but *use* of the lands. All our Indian lore tells us of the use to which the Indians had been accustomed to put those lands. They used them primarily – to adopt the language in the recital – "as their Hunting Grounds". They lived by hunting and foraging. The wild life inhabiting the forests, the lakes and rivers to a large extent was the source of their food supplemented only by what, in accordance with their primitive knowledge, they were able to grow on the land. . . . The aboriginal rights as to hunting and fishing affirmed by the *Royal Proclamation of 1763* and recognized by the treaty still exist.[536]

At the time of the Pottawatomi relocation, therefore, the entire *Royal Proclamation* area had been protected as one vast "Indian hunting ground." The magnitude of the presents provided to the Pottawatomi and others certainly evidence the extent to which aboriginal peoples hunted and fished at the time. We accept that, in the context of the 1837 address, it is unlikely that the Pottawatomi would have relocated to Canada, in many cases giving up annuities in the United States in exchange for the continuation of presents, had such basic and fundamental life-supporting activities as hunting and fishing been impaired in any way. This is so despite the Crown's developing "civilization" policy that had as its objective the curtailing of such pursuits in favour of an agricultural existence.

To be self-sustaining rather than a drain on the public purse, the Pottawatomi had to be free to hunt and fish once they relocated to Canada. Notwithstanding this understanding, it is common ground between the parties that, unlike other First Nations, the Moose Deer Point First Nation "does not have aboriginal title arising from historic occupation and possession of tribal lands before the assertion of sovereignty" by the European powers.[537]

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[535] *Royal Proclamation of 1763*, RSC 1985, Appendices, No. 1, 4-5.

[536] *R. v. White and Bob* (1964), 50 DLR (2d) 613 at 664 (BCCA), affirmed [1965] SCR vi, 52 DLR (2d) 481. Emphasis added. Norris J was quoting from the reasons of Roach JA in *Attorney-General (Canada) v. George* (1964), 45 DLR (2d) 709, [1965] 2 CCC 148, [1964] 2 OR 429 at 712-13 (DLR) (Ont. CA).

The Commission finds parallels between the council of 1837 and later treaties that also protected the Indians' right to continue to hunt, trap, and fish. For example, in their report relating to the creation of Treaty 8, Treaty Commissioners David Laird, J.H. Ross, and J.A.J. McKenna commented regarding the initial reluctance of the Indians of that area to enter treaty:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it. . . .
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> The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an understanding to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. *It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land.* Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, *in the event of settlement advancing*.[538]

Ultimately, Treaty 8 stipulated:

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[537] Reply Submission on Behalf of the Moose Deer Point First Nation, April 3, 1998, p. 3.

[538] "Report of Commissioners for Treaty No. 8," September 22, 1899, in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen's Printer and Controller of Stationery, 1966), 6-7. Emphasis added.

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have [the] right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and *saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.*[539]

There are similar provisions in the Robinson-Huron and Robinson-Superior Treaties of 1850, as well as the remaining numbered treaties from Treaty 3 to 11. From these excerpts it can be seen that, until the Indians were ready to settle on reserves and convert to agriculture-based subsistence, the Crown was prepared to allow them to continue to hunt, trap, and fish as if they had never entered into treaty. They would receive treaty goods suited to hunting until they took up farming, at which time agricultural implements would be substituted. However, in the Commission's view, it is significant that the Crown's protection of these traditional rights excepted tracts that would eventually be taken up for "settlement, mining, lumbering, trading or other purposes."

In light of these provisions, it becomes necessary to determine the impact of the arrival of white settlers on those traditional rights of use and occupation: Would the Crown continue to respect and protect traditional Indian rights, or would settlement and development prevail? This issue was considered by the Supreme Court of Canada in *Sioui*, in which, as we have seen, Lamer J was called upon to consider the Hurons' use of park lands for ceremonial purposes. He concluded that, rather than one use eclipsing the other, the two uses should, to the extent possible, be reconciled:

> Even a generous interpretation of the document . . . must be realistic and reflect the intention of both parties, not just that of the Hurons. *The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.*
>
> On the other hand, to accept the argument that the parties intended to limit the scope of the treaty to the Lorette territory would mean introducing a very severe restriction that is not justified by the wording of the document since Lorette is mentioned only as a destination for safe-conduct purposes. Given the nature of Indian

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[539] *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen's Printer and Controller of Stationery, 1966), 12. Emphasis added.

> religious rites and especially Indian customs at the time, any significant exercise of such rights would require territory extending beyond Lorette. . . .
>
> Accordingly, I conclude that in view of the absence of any express mention of the territorial scope of the treaty, *it has to be assumed that the parties to the treaty of September 5 intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests*. This, in my view, is the definition of the common intent of the parties which best reflects the actual intent of the Hurons and of [General] Murray on September 5, 1760. *Defining the common intent of the parties on the question of territory in this way makes it possible to give full effect to the spirit of conciliation, while respecting the practical requirements of the British*. This gave the English the necessary flexibility to be able to respond in due course to the increasing need to use Canada's resources, in the event that Canada remained under British suzerainty. *The Hurons, for their part, were protecting their customs wherever their exercise would not be prejudicial to the use to which the territory concerned would be put. The Hurons could not reasonably expect that the use would forever remain what it was in 1760*. Before the treaty was signed, they had carried on their customs in accordance with restrictions already imposed by an occupancy incompatible with such exercise. The Hurons were only asking to be permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their occupier. I readily accept that the Hurons were probably not aware of the legal consequences, and in particular of the right to occupy to the exclusion of others, which the main European legal systems attached to the concept of private ownership. Nonetheless I cannot believe that the Hurons ever believed that the treaty gave them the right to cut down trees in the garden of a house as part of their right to carry on their customs. . . .[540]

In the present case, we similarly find that, although the parties to the 1837 council clearly did not contemplate that some of the Pottawatomi would settle at Moose Deer Point and be given a reserve there, we cannot believe that they would have expected those Indians to continue their traditional hunting, trapping, and fishing activities on a severely limited land base like the three parcels, totalling 619 acres, which members of the First Nation were given in 1917 to maintain their homes and gardens. As Lamer J stated, given the nature of traditional hunting, fishing, and trapping activities, "any significant exercise of such rights would require territory extending beyond," in this case, reserve lands dedicated to residential and agricultural pursuits. We conclude that the parties must have expected that the Indian participants in the council of 1837 would make wide use of unsettled and undeveloped territories to exercise their traditional rights protected by the treaty.

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[540] *R. v. Sioui*, [1990] 1 SCR 1025 at 1069 and 1071-72. Emphasis added.

By the same token, the Pottawatomi, like the Hurons in *Sioui*, must be taken as recognizing that the increasing demands of settlement and development would mean that lands still open in 1837 would eventually be taken up for other uses. Again, like the Hurons, they could only expect "to be permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their occupier." It must be considered that the Indians would have understood that they would continue to enjoy their traditional rights only until such time as the lands on which they were able to exercise those rights were taken up for settlement or other purposes of the Crown. Ultimately, as Lamer J commented, the Indians had to know that their traditional rights would be whittled down as the lands around them became settled and developed, but the Crown must likewise have been prepared to accept that those rights could be exercised as long as they were not incompatible with the new uses and occupancies arising around them.

How is it to be determined when the Indians' traditional rights of use and occupation have become incompatible with new settlement and development? Once again, the words of Lamer J in *Sioui* are instructive:

> Since, in view of the situation in 1760, we must assume some limitation on the exercise of rights protected by the treaty, *it is up to the Crown to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Hurons' rights.*
>
> The Crown presented evidence on such compatibility but that evidence did not persuade me that exercise of the rites and customs at issue here is incompatible with the occupancy. . . .
>
> *For the exercise of rites and customs to be incompatible with the occupancy of the park by the Crown, it must not only be contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose.* First, we are dealing with Crown lands, lands which are held for the benefit of the community. Exclusive use is not an essential aspect of public ownership. Second, I do not think that the activities described seriously compromise the Crown's objectives in occupying the park. Neither the representative nature of the natural region where the park is located nor the exceptional nature of this natural site are threatened by the collecting of a few plants, the setting up of a tent using a few branches picked up in the area or the making of a fire according to the rules dictated by caution to avoid fires. These

> activities also present no obstacle to cross-country recreation. I therefore conclude that it has not been established that occupancy of the territory of Jacques-Cartier park is incompatible with the exercise of Huron rites and customs with which the respondents are charged.[541]

It can be seen from the foregoing passage that the onus is on the Crown to establish that the First Nation's traditional rights of use and occupation are incompatible with subsequent settlement and development authorized by the Crown. However, this conclusion presumes that the First Nation has already demonstrated what its traditional rights of use and occupation *are*. The Commission is by no means satisfied that the nature and extent of the First Nation's traditional rights have been revealed by the evidence in this inquiry. We believe that it is incumbent on the Moose Deer Point First Nation first to prove those rights that it claims are subject to the treaty's protection, at which time it will be open to Canada either to challenge those claims as not being valid treaty rights or to establish that the Indians' occupancy of the territory is contrary to the purpose underlying the Crown's occupancy or prevents the realization of that purpose.

In this inquiry, the Moose Deer Point First Nation has done little to describe or delineate the hunting, fishing, and trapping rights claimed to have been protected by the 1837 council. That such traditional rights were implied in the invitation to relocate is perhaps obvious. However, we were provided with little evidence as to the exercise or continuity of the traditional rights being claimed, the location in which hunting and fishing activities took place, the magnitude of such activities, whether they were commercial or for sustenance purposes, and so on. Nor did the First Nation indicate the manner in which the alleged encroachment of settlement and development had interfered with such rights. Since we have insufficient evidence to determine the territorial scope of the traditional rights claimed, or even the nature of those rights, we are unable to make any clear finding in this area other than the general statements of principle already set forth. As with our conclusion regarding the First Nation's land claim, we recommend that, with these general statements of principle in hand, the parties seek to negotiate a resolution of the claim to protection, failing which they can refer the question back to the Commission for further recommendations.

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[541] *R. v. Sioui*, [1990] 1 SCR 1025 at 1072-73. Emphasis added.

We turn now to the final promise claimed by the First Nation to have been made by Jarvis in 1837 – equality of treatment.

Equality

Moose Deer Point argues that another basis for concluding that Canada owes it an outstanding lawful obligation is that, in conjunction with the treaty promises of presents and land, the Crown promised that it would treat the Pottawatomi equally with other First Nations. Moose Deer Point submits that the Crown has failed to provide, or to provide in a timely way, sufficient land to members of the First Nation to enable them to carry on their traditional existence and to make the transition over time to a more modern economy. Instead, the Moose Deer Point people have been treated as a "marginal group" with "no treaty rights, no rights to use of land, no entitlement to annuity payments, and no entitlement to any assistance."[542] As counsel states:

> This view has grown up and is still repeated: despite the Crown's undertaking to its allies and the native allies' contribution on behalf of the Crown in the War of 1812, they have no rights here. Protests concerning the ending of the practice of distributing presents were ignored. Requests for land were ignored. Requests to be treated on an equitable basis with other First Nations in the area have been put off. The official attitude is that the U.S. native allies are refugees with claims on the grace and benevolence of the Crown and nothing more.[543]

By way of response, Canada asserts that "the evidence is conclusive that the promises made to the ancestors of the First Nation were as follows: as Indian allies they were welcome to move to Upper Canada; if they did so, they would continue to receive presents and would be treated in the same way as other Indians in the Province."[544] However, counsel argues that the claim as framed by Moose Deer Point is "too vague to address"; although the First Nation bears the burden of proving a *prima facie* infringement of the right claimed, it has "failed to provide even the particulars of the right being asserted," how it is to be realized, or how it has been infringed, making it "impossible to bring appropriate evidence to bear in the assessment of the claim."[545] In short, Canada submits:

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[542] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 90-91.

[543] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 91.

[544] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 33.

> With respect to the promise that the Indian allies would be treated in the same way as other Indians in Upper Canada, we would point out that there was no one way in which the Upper Canada Indians were treated, but rather endless variations. The circumstances of each band were distinct. Some received regular annuities, pursuant to treaties in which they had surrendered their aboriginal title. Others had been provided with lump-sum payments for those surrenders, and resided on land either reserved from the treaties, or set apart for them by the Crown or missionary societies. Still others lived on reserves purchased from their own funds. It is submitted that this promise meant nothing more nor less than an assurance that the Indian allies would be subject to the same laws and policies as other Indians in Upper Canada.[546]

Canada submits that, although presents were discontinued, other programs and policies, "appropriate to the time in which they were in force," were substituted, and that the First Nation has been treated "in the same way as other *Indian Act* bands in Canada."[547]

Canada and the Moose Deer Point First Nation appear to concur that the immigrating Indian allies were entitled to be treated on the same basis as Indians already residing in Upper Canada. The Commission agrees that, by virtue of the promises that had the effect of inducing the Pottawatomi and other native allies to leave the United States, Britain must be considered to have at least undertaken to treat its allies equitably with their aboriginal peers in Canada. We have reviewed the record of Jarvis's address and find some sense of this obligation in the following paragraph:

> Children, – Your Great Father the Lieutenant Governor, as a token of the above Declaration, transmits to the Indians a Silk British Flag, which represents the British Empire. Within this Flag, and immediately under the Symbol of the British Crown, are delineated a British Lion and a Beaver; by which is designated that *the British People and the Indians, the former being represented by the Lion and the latter by the Beaver, are and will be alike regarded by their Sovereign so long as*

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[545] Reply Submission on Behalf of the Government of Canada, April 1, 1998, p. 34.

[546] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 52.

[547] Written Submission on Behalf of the Government of Canada, August 7, 1997, p. 56.

> *their Figures are represented on the British Flag, or in other Words, so long as they continue to inhabit the British Empire.*[548]

Upon their arrival in Canada, various Pottawatomi clans and clan segments reacted in different ways to their circumstances. A few appear to have respected the urgings of Crown representatives like Jarvis and Keating by taking up residence at Manitoulin Island; most received the benefit of annuities or lands through their acceptance as full members into existing Indian communities; however, still others were driven – repeatedly, in some cases – from the land they had cleared by settlers and members of other First Nations.

In the case of the ancestors of the Moose Deer Point First Nation, they eventually settled in the vicinity of their present reserve, at the time relatively remote and isolated, where it appears they remained for a number of years before the Crown even became aware of their existence there. Although some fellow Pottawatomi joined settled First Nations and received treaty benefits, it seems apparent that the members of Moose Deer Point were not considered to have aboriginal title or rights that could be ceded in exchange for treaty rights; accordingly, they were not given the opportunity to participate in either the Robinson-Huron Treaty of 1850 or the Williams Treaty of 1923.

In the 1850s, Ogemawahj and his people, like all other Indians in Upper Canada, ceased receiving presents from the Crown. At that time, as we have seen, Ogemawahj objected on the basis that his people were disadvantaged relative to other Indians:

> Father,
> We, Potawatomies are poor. We do not receive annuities, we don't know how we can provide clothing for our families when we get no more Presents. This we wish our Great Father to know.

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[548] "Address of the Chief Superintendent of Indian Affairs to the Indians assembled in General Council at the Great Manitoulin Island," August 4, 1887, enclosed in Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, Vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated) (ICC Exhibit 21, pp. 155-56); see also Jameson, *Winter Studies and Summer Rambles* (ICC Exhibit 20, pp. 502-05); NA, RG 10, Records of Chief Superintendent's Office, Upper Canada, 1831-1847, vol. 66, pp. 63741-50 and 63751-57; Memorandum on "Indian Presents," September 23, 1943, DIAND, Claims and Historical Research Centre, Item I-116 (ICC Documents, pp. 348-49). Emphasis added.

> Father,
> We say again and we wish our Great Father to hear it, we have nothing to depend upon for a living, and hope he will continue to give us this bounty as he told our fathers he would do. He said he would continue to give us Presents as long as the sun should appear in the sky.[549]

In 1917, the people of Moose Deer Point received their 619-acre reserve, perhaps because the Crown belatedly recognized that it had certain responsibilities to the First Nation as a result of the promises made many decades earlier. More likely, from the evidence before us, the reserve was set apart for the First Nation because of political lobbying undertaken by a well-connected private individual, Wallace Nesbitt, who had become friendly with certain members of the community and had taken up their cause.

On these facts, the Commission finds that, in the technical sense argued by Canada, the members of the Moose Deer Point First Nation appear to have been treated *equally* with other Indians in Upper Canada. However, we are far from convinced that they have been treated *equitably*. To clarify by way of example, it might be argued that a poor man has been treated equally to a rich man if the poor man is subject to the same *amount* or even the same *rate* of tax; however, the entire scheme of the *Income Tax Act* is based on the premise that equal taxation is not necessarily equitable taxation. As a result, higher income earners are treated as having a greater ability to pay, and thus pay at a higher rate, are subject to more surtaxes, and are more likely to have certain benefits "clawed back." In the case of Indians generally and the residents of Moose Deer Point in particular, all had their presents withdrawn, but some were better able than others to absorb the loss by virtue of annuities and the benefits they could derive from their treaty lands. Having relinquished any claim to land rights in the United States to come north in reliance on the promises made by the British Crown, the Moose Deer Point First Nation had neither of these offsetting advantages, and thus had a correspondingly reduced ability to absorb the loss.

That being said, we are not in a position to assess the impact of these inequities in terms of the extent to which the First Nation has suffered as a result of the breach of its right to equality.

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[549] "Address of T.G. Anderson, Superintendent of Indian [A]ffairs[,] to the Chippewa, Potawatimie and Mohawk Indians under his Superintendence on the occasion of his making the last issue of Presents to be made to the settled Indians in Upper Canada," September 27, 1852, NA, RG 10, vol. 268 (ICC Exhibit 22, p. 163980).

Accordingly, we recommend that the parties negotiate this issue and refer the matter back to the Commission for further recommendations if they are unable to reach a negotiated settlement.

ISSUE 3 LAWFUL OBLIGATION

Does the Crown have an outstanding lawful obligation to the Moose Deer Point First Nation?

Having found that the council of 1837 gave rise to a treaty, and having considered the nature and scope of the Moose Deer Point First Nation's rights arising out of that treaty, it is now left to the Commission to determine whether Canada owes the First Nation any outstanding lawful obligations as a result of the Crown's implementation, or failure to implement, the terms of the treaty.

The First Nation begins with the premise that treaties or agreements made by the British with their Indian allies are binding on the Crown in right of Canada.[550] Canada has not disputed this point, and, indeed, in light of cases like *Sioui* in which the Supreme Court of Canada has proceeded on that very basis, we must concur that there is no issue on this question.

With respect to presents, Moose Deer Point submits that it would be unsound to suggest that the common intention of the parties in 1837 was that the entitlement to presents would end in the 1850s and that thereafter Britain's native allies would receive nothing except what they would obtain as members of other First Nations or, in the case of the Moose Deer Point First Nation, nothing at all. In the First Nation's view, the Crown has failed, since the 1850s, to provide presents pursuant to the treaty, and has furnished only inadequate educational, health, and relief benefits and, in 1917, a similarly inadequate reserve.[551]

On the subject of land, the First Nation contends that the provision of the modest 619-acre reserve in 1917 did not fulfill the promises made 80 years previously. According to counsel, the reserve resulted from the efforts of a benefactor, and the amount of land provided was a "mistake." In the result, the Crown failed to provide, or to provide in a timely way, sufficient lands to enable the

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[550] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 86.

[551] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 87 and 89; ICC Transcript, April 8, 1998, p. 107 (Gary Nelson).

First Nation to carry on its traditional economy and to make the eventual transition to a more modern economy.[552]

With respect to protection, Moose Deer Point asserts that it has not been protected in its use and occupation of lands and waters in the area of its reserve for traditional purposes. Not only have its rights not been recognized but advancing settlement and development, and increasingly restrictive game and fishing laws, have "practically deprived [the First Nation] of the use of the land."[553] Similarly, Moose Deer Point submits that, in treating the First Nation as a marginal group without any claim or entitlement, the Crown has failed to fulfill its promise of equality.[554]

In summary, the First Nation claims that, because the Crown has long considered the members of the First Nation to be self-reliant, Canada has taken this independence to mean that, notwithstanding requests for assistance since at least 1877, the First Nation has not required, and is not entitled to, the benefits promised by Jarvis. The First Nation submits that Canada owes it an outstanding lawful obligation, and that this claim should therefore be accepted for negotiation.[555]

Canada, by contrast, does not agree with the characterization of either the nature or the scope of the promises as claimed by the First Nation. In particular, it argues that the Crown did not breach any obligation by allowing lands used and occupied by the First Nation to be developed and settled; those lands were surrendered to the Crown by bands which had historically used and occupied the area, and there was no legal impediment to prevent the Crown from granting ownership or other rights in these lands for purposes of settlement and development.[556]

Canada denies that the promises made by Jarvis constituted a treaty, but contends that, even if they did, the Crown fulfilled its promises. Counsel submits that it was intended that the Indians locate on Manitoulin Island or, with the acceptance of bands for whose use and benefit reserves had already been set aside, on the reserves of those bands; most of the incoming Indians chose the latter course, although some, like the ancestors of the Moose Deer Point First Nation, elected to settle on other lands. Although Britain discontinued presents in the 1850s, it did so for all Indians and substituted other programs and policies to which all Indians had equal access. Moreover, although Canada contends that the First Nation was not entitled to land on Moose Deer Point, the First Nation was nevertheless given a reserve there in 1917 and has subsequently received the same benefits as other bands in Canada. Therefore, Canada submits that the First Nation's claim does not give rise to an outstanding lawful obligation.[557]

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[552] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 86-87 and 89; ICC Transcript, April 8, 1998, pp. 106-07 (Gary Nelson).

[553] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, p. 90.

[554] Written Submission on Behalf of the Moose Deer Point First Nation, August 1, 1997, pp. 90-91.

[555] ICC Transcript, April 8, 1998, p. 110 (Gary Nelson).

[556] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 54-55.

The Commission has already concluded that the 1837 council included the promise of presents, but that this treaty right was clearly and plainly extinguished by Anderson's speech of 1852. We have also found that Jarvis promised the incoming allies that they would receive land – at Manitoulin Island or in other locations that the Crown might permit, including lands already reserved for other bands, provided those bands were also prepared to consent. Coupled with these rights to presents and land were promises of equality and the right to use and occupy land for traditional purposes. We agree with the First Nation that the 1837 council included promises in respect of all these matters.

That being said, we are concerned that the evidence tendered by the First Nation to date has not yet sufficiently established the extent of these obligations or the nature of their infringement. With respect to land, we agree with Canada that the treaty does not specify the exact location of reserve lands, when they were to be set apart, or what acreage they were to contain. However, we do not believe that these shortcomings should rest entirely at the feet of the First Nation, since it was the Crown that made the promises. Having regard for the principles of treaty interpretation, the failure to be specific should more properly be attributed to the Crown than to the Indians. We make no comment on whether the First Nation has an outstanding entitlement to treaty land on Manitoulin Island, and we are not sure that, even if such an entitlement exists, the First Nation would want land there. If such an entitlement does exist, it would presumably be open to Canada and the First Nation to negotiate other land or other forms of compensation found to be mutually satisfactory.

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[557] Written Submission on Behalf of the Government of Canada, August 7, 1997, pp. 55-56.

It is perhaps significant that, in the face of land promised at Manitoulin Island or other areas acceptable to the Crown, the First Nation's ancestors nevertheless settled at Moose Deer Point, and we raise the question of whether, in these circumstances, the First Nation should even be permitted to claim an outstanding entitlement, having settled in a location without first obtaining the Crown's approval. However, it is no less significant that, in 1917, Canada expressed a willingness to allow the First Nation to have land on Moose Deer Point. Having done so, is it now open to Canada to challenge the First Nation's right to land in that location? Given that the 1837 council gave rise to treaty rights to land, we believe that the issue of whether those rights have been fulfilled is properly the subject for negotiation.

With respect to the First Nation's equality rights and rights of use and occupation of lands for traditional purposes, we are unable to be so categorical. In our view, the First Nation has failed to tender the sort of evidence on which we can comfortably rely to define the precise extent of those rights or to be able to conclude definitively that the Crown has failed to fulfill them. Nevertheless, we are not prepared to conclude that Canada owes no outstanding lawful obligation to the First Nation. Having determined that the 1837 council was a treaty and that certain promises were made by the Crown to the assembled Indians, we believe that it is incumbent on Canada to work with Moose Deer Point to further research and negotiate the First Nation's outstanding entitlements, if any, under that treaty.

This is particularly so since the circumstances of this case give rise to the concern that the Moose Deer Point First Nation has been treated unfairly. It strikes us as unconscionable for the Crown to induce its native allies to forsake their aboriginal lands and rights in the United States to come north, and then, after taking away the presents that constituted the main inducement, to argue that those allies have no land or traditional rights worthy of forming the subject matter of a treaty. As we have already seen, although the withdrawal of presents applied to all Indians *equally*, it did not apply *equitably*. In this context, we recall the Commission's "supplementary mandate" to make recommendations where we conclude that the Specific Claims Policy has been implemented correctly, but the outcome is nonetheless unfair. In this case, the outcome appears to be unfair, and we are not entirely sure that the Policy has been implemented correctly in any event. We thus believe that there is an even stronger basis for invoking our supplementary mandate. Accordingly, we recommend that, provided that further research will disclose further evidence to substantiate the First Nation's treaty rights, Canada should negotiate the claim in the same spirit of conciliation contemplated by Lamer J in *Sioui*.

PART V

RECOMMENDATIONS

We have found that promises were made to the Pottawatomi ancestors of the Moose Deer Point First Nation in 1837, and that those promises amounted to a treaty. However, although the Crown has unilaterally extinguished its treaty obligation to provide presents, we have been unable to define the scope of the remaining promises of land, protection, and equality or to clearly establish whether they have been fulfilled or breached. We have therefore also been unable to determine whether the Specific Claims Policy has been implemented correctly. Nevertheless, we conclude that it was unfair for the Crown to use presents and other promises to induce the Pottawatomi and other Indian allies to give up their lands and rights in the United States, and then to withdraw the presents while at the same time contending that the allies had no rights to land or annuities.

We therefore recommend:

1 **That Canada and the Moose Deer Point First Nation undertake research to further define Canada's obligations arising from the Crown's promises of 1837 and to verify whether those obligations have been fulfilled.**

2 **That, if Canada's obligations have not been fulfilled, the claim be accepted for negotiation under the Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

Roger Augustine

Carole T. Corcoran
Commissioner

Roger J. Augustine
Commissioner

Dated this 31st day of March, 1999.

APPENDIX A

MOOSE DEER POINT FIRST NATION INQUIRY

POTTAWATOMI RIGHTS

1 Planning conference — Ottawa, August 30, 1996

2 Community sessions

By agreement of counsel for the parties, community sessions were considered unnecessary for dealing with the issues before the Commission at the inquiry.

3 Legal argument — Moose Deer Point First Nation, April 8, 1998

4 Content of formal record

The formal record for the Moose Deer Point First Nation Inquiry consists of the following materials:

- the documentary record (2 volumes of documents, with annotated index) (Exhibit 1)
- Exhibits 2-23 tendered during the inquiry
- transcript of oral submissions (1 volume)
- written submissions and rebuttal submissions of counsel for Canada and counsel for the Moose Deer Point First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.